Supreme Court, U. S.
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JUL 21 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 80 Original

THE STATE OF COLORADO, PLAINTIFF,

v.

THE STATE OF NEW MEXICO,
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE OF
NEW MEXICO, DEFENDANTS

ORDER FOR APPEARANCE, MOTION FOR LEAVE TO FILE COMPLAINT, COMPLAINT, AND STATEMENT OF FACTS AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

J. D. MacFARLANE
Attorney General of Colorado

DAVID W. ROBBINS
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ATTORNEY GENERAL OF THE STATE OF
NEW MEXICO, DEFENDANTS

ORDER FOR APPEARANCE

The Clerk will please enter our appearance as counsel for the State of Colorado.

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MOTION FOR LEAVE TO FILE COMPLAINT

The State of Colorado, appearing by its duly authorized Attorney General, the Honorable J. D. MacFarlane, respectfully moves the Court for leave to file its complaint against the State of New Mexico and the Honorable Toney Anaya, Attorney General of the State of New Mexico, submitted herewith.

J. D. MacFARLANE
Attorney General of Colorado

DAVID W. ROBBINS
Deputy Attorney General
State of Colorado

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COMPLAINT

The State of Colorado, by its Attorney General, brings this suit against the defendant State of New Mexico and its Attorney General, and for its cause of action states:

1. The plaintiff State of Colorado is one of the fifty sovereign states.

2. The defendant State of New Mexico is one of the fifty sovereign states.

3. The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2, of the Constitution of the United States and 28 U.S.C. Section 1251.

4. The Vermejo River, an interstate stream, rises in a mountainous region of Colorado near its southern border.

The principal tributaries to the Vermejo rising within the State of Colorado are Little Vermejo Creek, Fish Creek, and Ricardo Creek. The watershed of these three streams encompasses approximately twenty-eight square miles of land within the State of Colorado abutting on the northern border of the State of New Mexico. The Vermejo River is tributary to the North Canadian River which is, in turn, tributary to the Arkansas River, all of which are interstate streams. The Vermejo River includes the main stem and its tributaries. There is no Compact or decree of this Court apportioning or adjudicating the water of the Vermejo River between Colorado and New Mexico.

5. Pursuant to the provisions of Colorado Revised Statutes 1973, §§ 37-92-101, *et seq.*, jurisdiction over water matters within the State of Colorado is vested in seven district courts, each having jurisdiction over defined river systems within the state, all as more specifically stated in Colorado Revised Statutes 1973, § 37-92-201.

6. The plaintiff State of Colorado adheres to the doctrine of prior appropriation and water rights are initiated by appropriation and confirmed by court decree issued after notice and hearing.

7. On June 20, 1975, the Colorado District Court for Water Division No. 2, in Case No. W-3961, awarded to C. F. & I. Steel Corporation, a Colorado corporation, a conditional water right for the diversion of a certain portion of the waters of the Colorado tributaries of the Vermejo River. The diversion points decreed are entirely within the State of Colorado for waters rising within the State of Colorado. The decree authorizes the diversion of these waters into the watershed of the Purgatoire River, a tributary of the Arkansas River within the State of Colo-

rado. All legal prerequisites for the awarding of a decree were satisfied by the claimant and the decree is valid under the law of Colorado.

8. On April 26, 1976, entities claiming water rights within the State of New Mexico filed suit in the United States District Court for the District of New Mexico in Case No. CIV-76-244-P to enjoin the use in Colorado of the water right — described in paragraph 7 — until and unless the claimed water rights in New Mexico are fully satisfied. The plaintiffs in the New Mexico District Court case were supported by the State of New Mexico as *amicus curiae*. On motion for summary judgment the District Court entered a permanent injunction granting the relief prayed. That matter is presently on appeal in the United States Court of Appeals for the Tenth Circuit.

9. Pursuant to an exchange of letters dated September 16, 1976 and September 28, 1976, the Governors of the states of Colorado and New Mexico, the Honorable Richard D. Lamm and the Honorable Jerry Apodaca, initiated an attempt to settle the states' differences concerning the waters of the Vermejo River through the vehicle of a negotiated Compact. Commissioners appointed for the purpose met to discuss the possibility of arriving at agreeable terms and conditions for such a Compact. Those meetings occurred on February 8, 1977 and May 18 and 19, 1977. At the close of the meeting on May 19, 1977, the New Mexico Commissioners informed the Colorado Commissioner that they could not recommend an agreement that would allow the State of Colorado to use water from the Vermejo River system and they therefore terminated further negotiations at that time.

10. On January 19, 1978, the Colorado Water Conservation Board resolved and urged the State of Colorado through its Governor and Attorney General to institute

an original action in the Supreme Court of the United States against the State of New Mexico pursuant to Section 2, Article III of the United States Constitution, in order to assert and define the rights of the State of Colorado and its citizens to the use of the waters originating within the State of Colorado in the Vermejo River and its tributaries.

11. Subsequent to the action of the Colorado Water Conservation Board the Governor of the State of Colorado, pursuant to the Constitution of the State of Colorado and applicable statutes and laws, requested the Attorney General of the State of Colorado to institute the instant proceeding.

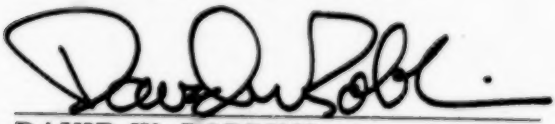
12. The plaintiff State of Colorado has a right and a duty to secure for itself and its citizens a certain equitable share of the waters of all interstate streams rising in and passing through its boundaries and particularly the Vermejo River.

13. The amount of water flowing in the three streams in Colorado tributary to the Vermejo River is significant in terms of the water available in south central Colorado. That region is extremely arid and its economy and the welfare of its citizens depend on the water available for beneficial use. This is particularly true in the drainage of the Purgatoire River where the use of waters pursuant to the decree described in paragraph 7 above is proposed.

14. It is essential to the protection of the State of Colorado and the welfare of its citizens that the equitable share of the State of Colorado in and to the waters of the Vermejo River be determined so that valid water rights in Colorado may utilize such share.

WHEREFORE, the State of Colorado respectfully prays that a decree be entered adjudicating the equitable shares of the parties hereto to the waters of the Vermejo River and its tributaries and declaring that all rights to such waters within the States of Colorado and New Mexico are subject to such equitable shares.

J. D. MacFARLANE
Attorney General of Colorado



DAVID W. ROBBINS
Deputy Attorney General
State of Colorado

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ATTORNEY GENERAL OF THE STATE OF
NEW MEXICO, DEFENDANTS

STATEMENT OF FACTS AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

A controversy exists between the plaintiff and the defendants concerning rights in and to the waters of an interstate stream, the Vermejo River and its tributaries rising within the State of Colorado and flowing in a southerly direction into the State of New Mexico.

The original jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the United States Constitution and under the Judiciary Act, 28 U.S.C. § 1251 (a) (1).

STATEMENT OF FACTS

The Vermejo River, a tributary of the North Canadian River, which is in turn tributary to the Arkansas River, rises high in the Sangre de Cristo mountains near the southern boundary of the State of Colorado. Three tributaries of the Vermejo River have a drainage area within Colorado of approximately 28 square miles and flow in a southerly direction into the State of New Mexico where they become part of the Vermejo River. These tributaries are Ricardo Creek, Fish Creek, and Little Vermejo Creek.

A Colorado District Court has decreed a water right out of the three tributaries of the Vermejo River within the State of Colorado to C. F. & I. Steel Corporation, a Colorado corporation. The water right was granted in Case No. W-3961 in Water Division No. 2 on June 20, 1975, having an appropriation date of May 3, 1960. The right thus decreed permits the diversion of water from the three streams tributary to the Vermejo for use in the drainage of the Purgatoire River, all in the State of Colorado.

The south central region of Colorado, into which the waters so decreed are proposed to be diverted, is extremely arid, and its economy is largely dependent upon and limited by the availability of water for beneficial use. The diversion of water to the Purgatoire River, pursuant to the Colorado decree, is permitted for multiple beneficial uses. In equity, the State of Colorado and its citizens are entitled to the benefit of an equitable share of waters arising in this arid area of Colorado.

Various entities claim the right to use the waters of the Vermejo River within the State of New Mexico for various purposes. In a lawsuit filed in the United States District Court for the District of New Mexico on April 26, 1976, New Mexico appropriators from the Vermejo River,

supported by the State of New Mexico as *amicus curiae*, sought to obtain an injunction precluding the use of the waters of the Vermejo River or its tributaries until and unless all of their claimed water rights were fully satisfied. The injunction, granted on motion for summary judgment, is presently on appeal in the United States Court of Appeals for the Tenth Circuit under Case No. 78-1193. By its terms this injunction subordinates usage of water by the Colorado claimant to all New Mexico claimants.

After this litigation was commenced the State of Colorado attempted to reach agreement with the State of New Mexico upon an equitable apportionment of the waters of the Vermejo River. Pursuant to an exchange of letters dated September 16, 1976 and September 28, 1976, the Governors of the states of Colorado and New Mexico initiated proceedings in an attempt to apportion the waters of the Vermejo River in question through negotiation and Compact. At a Compact negotiating session on May 19, 1977, the commissioners from the State of New Mexico informed the commissioner from the State of Colorado that further negotiations would be inappropriate as New Mexico's view was that the State of Colorado and its citizens had no right to make diversions from the waters of the Vermejo River in Colorado and that New Mexico was entitled to the entire flow of the river to satisfy all of New Mexico's decrees. This litigation seeks to establish the equitable share of the State of Colorado in and to the waters of the Vermejo River and its tributaries so that valid water rights in Colorado may be exercised by its citizens to the fullest extent consonant with Colorado's equitable entitlement to a share of an interstate stream.

POINTS OF LAW

The waters of the Vermejo River arising within the State of Colorado are constitutionally declared in Colorado to be the property of the public and dedicated to the use of the people of the state, subject to appropriation.[1]

This Court in numerous decisions has determined that conflicts as to the rights of different states, on behalf of their respective citizens, to the waters of interstate streams may properly be adjudicated under the Court's original jurisdiction. Article III, Section 2, United States Constitution; 28 U.S.C. § 1251. *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945); *Colorado* v. *Kansas*, 320 U.S. 383 (1943); and *Wyoming* v. *Colorado*, 259 U.S. 419 (1922).

In *Nebraska* v. *Wyoming*, 235 U.S. 589 (1945), the Court thoroughly discussed the matter of disputes between states concerning water in over-appropriated streams and stated that these controversies are appropriate for consideration by the Court and constitute a justiciable controversy under the original jurisdiction of the Court. As the Court stated in the case of *Hinderlider* v. *La Plata and Cherry Creek Ditch Co.*, 304 U.S. 92, at 104 (1938):

> The extent of the existing equitable right of Colorado and of New Mexico in the La Plata River could obviously have been determined by a suit in this Court, as was done in *Kansas v. Colorado*, 206 U.S. 46, 51 L. ed. 956, 27 S.Ct. 655, supra, in respect to rights in the Arkansas River and in *Wyoming* v. *Colorado*, 259 U.S. 419, 66 L. ed. 999, 42 S.Ct. 552, supra, in respect to the Laramie. But resort to the judicial remedy is never essential to the adjustment of interstate controversies, unless the States are unable to agree upon

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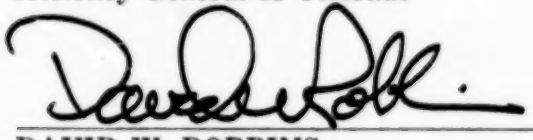
[1] Article XVI, Section 5, Colorado Constitution.

> the terms of a compact, or Congress refuses its consent. The difficulties incident to litigation have led States to resort with frequency, to adjustment of their controversies by compact, even where the matter in dispute was the relatively simple one of a boundary.

Here the states of Colorado and New Mexico have been unable to agree upon a Compact for the waters of the Vermejo River, thereby leaving the State of Colorado no alternative but to file this action in order that there be preserved to Colorado and its citizens an equitable share in the use and enjoyment in the waters of the Vermejo River. Only this Court can grant such relief.

It is respectfully requested that the motion for leave to file the complaint be granted.

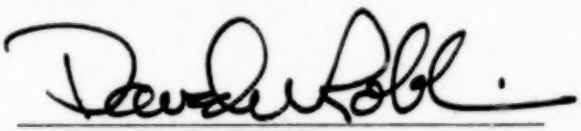
J. D. MacFARLANE
Attorney General of Colorado



DAVID W. ROBBINS
Deputy Attorney General
State of Colorado

PROOF OF SERVICE

I, DAVID W. ROBBINS, Deputy Attorney General, State of Colorado, one of the Attorneys for the Complainant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 18th day of July, 1978, I served copies of the foregoing Order for Appearance, Motion for Leave to File Complaint, Complaint and Statement of Facts and Brief in Support of Motion for Leave to File Complaint, by first class mail, postage prepaid, to the Office of the Governor and Attorney General, respectively, of the State of New Mexico.



DAVID W. ROBBINS
Deputy Attorney General
State of Colorado

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STATE OF COLORADO, *Plaintiff*

v.

STATE OF NEW MEXICO,
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE OF
NEW MEXICO, *Defendants*

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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October 11, 1978

VERGARA PRINTING CO. - SANTA FE, NEW MEXICO

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I. Colorado's proposed complaint is not a complaint for equitable apportionment, but rather a veiled attempt to dissolve an injunction against CF&I 8

II. Colorado makes no beneficial uses from the Vermejo River and therefore has no equitable right to its water. Accordingly, the proposed equitable apportionment action does not present a justiciable controversy 12

III. Colorado lacks standing to sue for an equitable apportionment of the Vermejo River because she makes no beneficial uses from it. She therefore suffers no injury from New Mexico's established uses 20

IV. If Colorado's complaint raised issues justiciable as an equitable apportionment, it would be barred by laches; stripped of its equitable rhetoric, however, the proposed complaint recites nothing beyond the private legal relationships properly cognizable in the pending litigation in the 10th Circuit Court of Appeals 27

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IN THE

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No. 80, Original

STATE OF COLORADO, *Plaintiff*
v.
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ATTORNEY GENERAL OF THE STATE OF
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BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

STATEMENT OF THE CASE

The Vermejo River is a small, non-navigable stream rising on the southeastern slopes of the Sangre de Cristo mountains just above the Colorado-New Mexico state line. Some twenty-eight square miles of Vermejo River drainage lie in Colorado. The area is uninhabited, and no use or diversion of Vermejo waters has ever been made in Colorado.

The only stream gage on the Vermejo River in New Mexico is near the abandoned town of Dawson. The gage measures flow from a total drainage area of approximately 300 square miles,

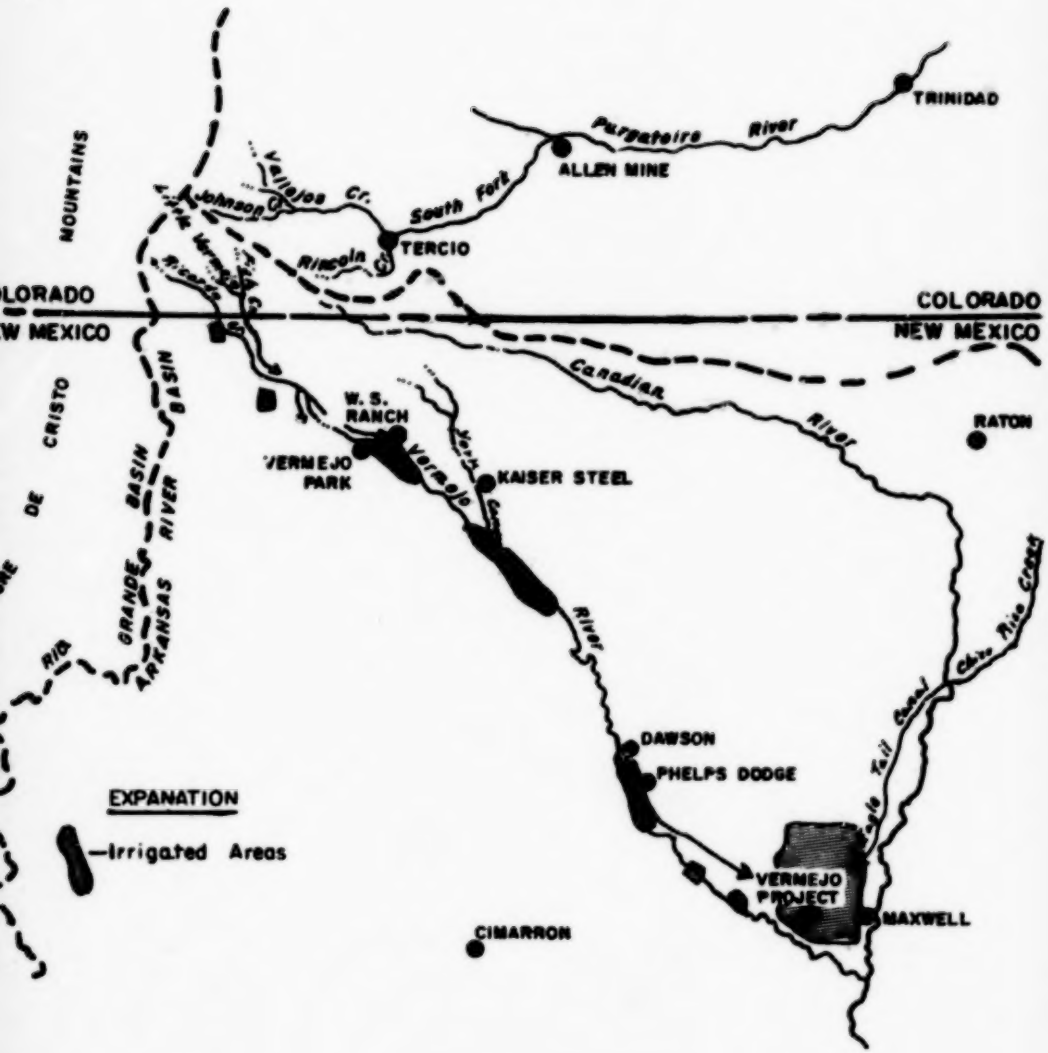
including the area in Colorado. United States Geological Survey records show the average annual flow at Dawson to be 13,100 acre feet for the period 1927-75. The minimum annual flow, which occurred in 1951, was 1,300 acre feet. At times there is no flow in the river at the gage.

Historically there have been no uses of Vermejo River waters in Colorado. There is none today. In New Mexico, on the other hand, an agrarian and industrial economy has developed from actual diversion and application to beneficial use of Vermejo waters dating back to the middle 1800s. The river is fully appropriated, and the economy of the area depends upon the continued flow of the river.

In Colorado there is no economic or social dependence upon the Vermejo River. However, on May 5, 1973, Colorado Fuel and Iron Steel Corporation filed an application in Colorado district court for Water Division No. 2, numbered W-3961, seeking judicial approbation of a conditional or inchoate water right for a proposed trans-mountain diversion of Vermejo waters into the Purgatoire River system for a planned industrial development of some 260,000 acres of corporation-owned land in Las Animas County, Colorado. Obviating local apprehension, CF&I's notice of intent to appropriate was published with the caveat that "(t)he water claimed in this application is not tributary to any stream in Colorado and is not subject to call by any existing Colorado decrees." (Bent County Democrat, June 7, 1973, Las Animas, Colorado).

Pursuant to Colorado law the water referee issued an order on April 18, 1975, denying CF&I's application *inter alia* because:

> 5. . . . (S)aid waters are proposed to be diverted, and the lands upon which said ditch is to be located, are all outside Water Division No. 2, and are located in an area of Colorado which is not in any of the Seven Water Divisions.



6. . . . (S)aid water is claimed for irrigation, domestic, industrial, recreation, and power uses. Also that after written request by the Referee, the applicant has refused to give any more detail (sic) information as to what specific uses will be made of said water or where such uses will occur. Applicant has indicated to the Referee

that at this time they do not know how the water will actually be used.

7. . . . (S)aid proposed uses are speculation and do not constitute a bona fide conditional appropriation upon which a conditional water right can be based. (Ruling of Referee, *In the Matter of the Application for Water Rights of CF&I Steel Corporation*, No. W-3961, In the District Court in and for Water Division No. 2).

On May 6, 1975, CF&I moved for reconsideration, asserting that the referee was wrong respecting the jurisdictional reach of Water Division No. 2 and that the corporation's planned development was not speculative as a matter of law, but was definite in concept: "The project contemplated is one of very considerable magnitude on the part of a corporation which has vast acreages of land to develop." (Memorandum in Support of Motion for Reconsideration, p. 2, Cause No. W-3961, *supra*). CF&I also pointed out to the referee that "there is no other owner or potential owner in Colorado who would be affected by (the proposed) diversion or the tying up for future diversion of waters that would otherwise go into New Mexico."[1] (*Id.*, p. 6).

On May 12, 1975, the referee overruled his initial order and recognized an inchoate right to make a future diversion of 75 cfs from the headwaters of the Vermejo River, an amount likely in excess of the entire maximum flow of the river.

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1. In an attempt to obtain sufficient water rights for the related development of a washery for the Allen Mine in Las Animas County, CF&I recently attempted to revive water rights from a washery in Pueblo abandoned in 1918. The protests of the City of Trinidad and the Purgatoire River Water Conservancy District bear witness to the fully appropriated condition of the Purgatoire River system and suggest that CF&I's most recent attempt to obtain water for future development by taking it from New Mexico users, is somewhat intemperate, to say the least. *Cf.*, *In re CF&I Steel Corporation in Las Animas County*, 183 Col. 135, 515 P.2d 456 (1973).

There are still no actual appropriations of Vermejo water in Colorado. The only other thought given to such an appropriation exists in the form of an application of the Colorado Water Conservation Board filed on November 12, 1976, for a right to a minimum instream flow of 5 cfs. (Cause No. W-4530, Water Division No. 2). By the terms of a stipulation between the Colorado Water Conservation Board and CF&I, filed in the proceedings in Water Division No. 2 on January 31, 1977, it was agreed that the Board would withhold further action on its application pending Colorado's attempt to obtain an apportionment of the Vermejo waters. CF&I agreed not to oppose the Board's application, and the Board agreed not to oppose CF&I's proposed trans-mountain diversion. What's good for CF&I is good for Colorado.

In contrast to Colorado's interest in Vermejo waters, i.e., CF&I's planned development, New Mexico's interests are real. On November 21, 1941, the New Mexico district court for Colfax County entered its final decree in *Phelps Dodge Corporation, et al. v. W. S. Land and Cattle Co., et al.*, No. 7201, adjudicating the rights to the use of Vermejo River waters in New Mexico. Irrigation and storage rights are decreed for approximately 15,000 acres with priorities ranging from 1867 to 1937. Industrial rights date from 1873. The Vermejo Conservancy District, serving a turn-of-the-century reclamation project of some 7,250 acres, has priorities dating from 1877 to 1906. Municipal and domestic rights also date from the 1800s. The New Mexico users with historically established and adjudicated rights have experienced chronic and often severe shortages of water.

Upon learning of CF&I's decreed conditional right, four New Mexico water users – Kaiser Steel Corporation, Phelps Dodge Corporation, Vermejo Park Corporation, and the Vermejo Conservancy District – filed suit on April 26, 1976, in federal district court in Albuquerque, asking that the court enjoin CF&I from diverting Vermejo waters "unless and until the prior rights

of Plaintiffs have been filled and satisfied. . . ." (Complaint, p. 3, *Kaiser Steel Corporation et al. v. CF&I Steel Corporation,* Civil No. 76–244). Applying the principles of prior appropriation indigenous to both Colorado and New Mexico, the federal district court entered its order of summary judgment on January 16, 1978, enjoining CF&I from any out-of-priority diversion of Vermejo waters. In effect, the court's order recognizes the fully appropriated condition of the Vermejo River, protects existing uses from threatened interference, and, as a practical matter, precludes CF&I's planned diversion of Vermejo waters.

Notice of appeal to the 10th Circuit Court of Appeals was filed by CF&I on February 13, 1978. (*Kaiser Steel Corporation, et al. v. CF&I Steel Corporation,* 10th Cir. No. 78-1193). On August 16, 1978, Judges Lewis and McWilliams issued the 10th Circuit's order removing the appeal from the active calendar of the court "pending a decision of the Supreme Court of the United States" in this action.

During the pendency of the federal district court action, Governor Richard Lamm of Colorado wrote to New Mexico Governor Jerry Apodaca on September 15, 1976, noting that there "may be a potential conflict" between water rights long established under New Mexico law and CF&I's development plans, and suggested that the two states negotiate a settlement in lieu of an equitable apportionment action in this court. In the spirit of comity, Governor Apodaca agreed to discuss the "problem," but noted his opinion that the doctrine of equitable apportionment was inapplicable because of the reliance in New Mexico "upon long established appropriations of Vermejo River waters. . . ."

Representatives were appointed by each state, and after an informal gathering on February 8, 1977, a formal meeting was scheduled for May 19, 1977. At that meeting the "compact" negotiations to which Colorado has alluded in her proposed

complaint were promptly terminated by New Mexico on the ground that "there are extensive uses of the waters of the Vermejo River system in New Mexico with ancient priority dates, that these uses suffer severe and chronic shortages, and there are not now, and never have been, diversions from the system in Colorado." The negotiations, it was thought, seemed "more a strain on comity than (they) would seem to engender comity." It was New Mexico's view that Colorado's primary interest in seeking to negotiate a compact was to acquire some semblance of integrity in anticipation of this action.[2]

Colorado thus comes before this Court with no existing uses and no existing equities, seeking leave to justify an "equitable apportionment" of the waters of the Vermejo River. In truth, however, Colorado seeks not an equitable apportionment, but rather an avaricious apportionment. She possesses only one interest in Vermejo waters – the paper right of CF&I. The proposed action, in reality, is nothing greater than an attempt by CF&I to enjoin long established uses in New Mexico in order to make water available for contemplated uses of its own. Nominally designated an action in equitable apportionment, Colorado's proposed complaint is an effort at corporate expansion wrapped in the rhetoric of constitutional law.

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2. This view was not without support. Along with Governor Lamm's initial letter to Governor Apodaca there was inadvertently enclosed a memorandum from the attorney general's office to Governor Lamm's executive assistant wherein it was stated that "this office and counsel for CF&I" were of the opinion that compact negotiations would place Colorado "on a better footing" in the anticipated litigation, viz., this proposed suit.

It should also be noted that New Mexico's participation in the private litigation in federal district court was not to "support" the New Mexico water users, as Colorado has stated, but simply to inform the court of the status of the purported compact negotiations. Colorado, on the other hand, actively participated in the New Mexico litigation by moving the court to stay its injunction on the theory that Colorado has an interest in interstate waters that transcends the equities of her citizens.

POINT I

COLORADO'S PROPOSED COMPLAINT IS NOT A COMPLAINT FOR EQUITABLE APPORTIONMENT, BUT RATHER A VEILED ATTEMPT TO DISSOLVE AN INJUNCTION AGAINST CF&I.

The proposed complaint is unique. Never in the history of litigation over interstate waters has an upstream, non-using state suddenly claimed an "equitable" right to the waters of a mountain stream long over-appropriated in the downstream state. There is no name for such a suit. In effect, the proposed action would invoke the aid of equity to secure a conversion at law.

Ostensibly Colorado's complaint states a cause in equitable apportionment, a "term used to identify the federal interstate disputes over water rights in the original jurisdiction of the Supreme Court." [Clark, Robert Emmet, *Waters and Water Rights,* Vol. 2 §132.1, p. 324; *see, e.g., Kansas v. Colorado,* 206 U.S. 46 (1907); *Nebraska v. Wyoming,* 325 U.S. 589 (1945)]. In fact, it is designed to secure for CF&I the water the company was denied by the federal district court's injunction of January 16, 1978.

As between states following the same internal law, the federal common law utilized in equitable apportionment suits derives from an application of common principles without regard to political boundaries. [*Wyoming v. Colorado,* 259 U.S. 419 (1922)]. Assuming the doctrine were applicable here, the Court would begin its analysis by applying priority of appropriation interstate.[3] At times, however, the Court has varied the strict

3. Essentially, this was the basis of the federal district court's decision in *Kaiser Steel Corporation et al. v. CF&I Steel Corporation,* Civil No. 76-244, *supra. Cf., Bean v. Morris,* 221 U.S. 485 (1911). On the principles of equity familiar to both states individually, CF&I's conditional decree could not have been granted. For obvious reasons new appropriations are not permitted on fully appropriated streams. Courts do not purposely create social disruption.

application of priority of appropriation interstate. For example, in *Wyoming v. Colorado,* 243 U.S. 622 (1917), the Court requested argument on:

> whether the rights asserted are to be tested and determined solely by the application of the general principles of prior appropriation, without regard to state boundaries, or whether, on the contrary, the general principles of prior appropriation are subject to be restricted or their operation limited in this case by state lines, and if so, by what principles, under the assumption, the case is to be controlled. (243 U.S. at 622).

Variations from the basic principle of priority of appropriation have been generated only when the fortuity of a state line enabled conflicting social institutions to develop simultaneously. Development on the North Platte River provides an example. When Nebraska initially sought an apportionment of the river on the basis of priority of appropriation interstate, out-of-priority diversions had been common because the states had never regulated their diversions in subordination to downstream seniors in the other states. (*Nebraska v. Wyoming, supra,* 325 U.S. at 592-607). Instead of applying the doctrine of priority of appropriation interstate, which would have profoundly changed the demographic and economic arrangement of the three-state area, Justice Douglas concluded that the circumstances warranted variation:

> . . . If an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible. For example, the economy of a region may have been established on the basis of junior appropriations. So far as possible these established uses should be protected though strict application of the priority rule might jeopardize them. Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several

> sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former – these are all relevant factors. They are merely an illustrative not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made.
>
> Practical considerations of this order underlie Nebraska's concession that the priority rule should not be strictly applied to appropriation in Colorado, though some are junior to the priorities of appropriators in Wyoming and Nebraska. (325 U.S. at 618-19).

Assuming this Court were to grant Colorado's motion for leave to file her complaint, no such delicate adjustment of interests could be made. On the Vermejo there has been no historic development of conflicting interests. Instead, Colorado would now call upon the equity jurisdiction of the Court to impose upon the states the social conflict it is ordinarily called upon to resolve. This approach asks for an equitable apportionment in a vacuum, at a time when the circumstances do not call for it. Not only would Colorado be asking the Court to put the cart before the horse, she would be asking the Court to do so at a time when there is no horse.[4] It is more likely, therefore, that the real motive in Colorado's proposed lawsuit is to

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4. The Gila River in New Mexico provides an example of the variation of priority of appropriation interstate. In order to protect a long established economy in New Mexico, the Court's decree in *Arizona v. California*, 373 U.S. 546 (1963), sanctions junior uses in New Mexico notwithstanding senior priorities in Arizona. The remedy of equitable apportionment, however, was made available because of "long established" competing economies. In the matter at bar Colorado's proposed action presumes the social conflict that forms the basis of the need to vary priority of appropriation.

collaterally dissolve the injunction issued against CF&I by the federal district court in Albuquerque.

Again assuming the proposed action were in reality an action for equitable apportionment, the question would be whether CF&I's 1975 paper right provides Colorado with the equitable interest in Vermejo waters requisite to a variation of prior appropriation interstate. The decision in *Arizona v. California*, 298 U.S. 558 (1936), is germane:

> Arizona, by her proposed bill of complaint, asserts no right arising from her own appropriation of the waters of the Colorado river. No infringement of her rights acquired by appropriation is alleged, and no relief for their protection is prayed. While it is alleged that definite plans have been made for the irrigation of 1,000,000 acres of unirrigated land in Arizona, and a right to share in the water for that purpose is asserted, it does not appear that any initial step toward appropriation of water for such a project has been taken. (298 U.S. at 566).

Arizona insisted that the Court would "not hold itself restricted to the rigid application of local rules governing private rights. . . ." (298 U.S. at 568). The Court, however, determined that the proposed equitable apportionment was premature:

> The allegations and prayer of the bill are of significance only if Arizona, in advance of any act of appropriation, and independently of any rights which she may have acquired under the Boulder Canyon Project Act, may demand a judicial decree exempting the available water of the river, or some of it, from appropriation by other states until the indefinite time in the future when she or her inhabitants may see fit to appropriate it. A justiciable controversy is presented only if Arizona, as a sovereign state, or her citizens, whom she represents, have present rights in the unappropriated water of the river, or if the privilege to appropriate the water is capable of division and when partitioned may be judicially protected from appropriations by others pending its exercise. (298 U.S. at 567).

As in *Arizona v. California*, Colorado's proposed complaint does not present a controversy that can be articulated as an equitable apportionment. At best it's a rather arcane collateral attack on the existing injunction against CF&I. It would have the Court effectively enjoin existing uses in New Mexico in order to facilitate contemplated uses in Colorado. Instead of posing a dispute arising out of historical fact, Colorado asks the Court to manufacture the problem by pitting CF&I's aspirations against the continued welfare of thousands of New Mexico citizens and then to solve it in a way that rewards CF&I's aspirations. Such a procedure would hardly be equitable. In effect, Colorado would ask the Court to substitute rapacity for equity and to impose it on a contrived controversy.

POINT II

COLORADO MAKES NO BENEFICIAL USES FROM THE VERMEJO RIVER AND THEREFORE HAS NO EQUITABLE RIGHT TO ITS WATER. ACCORDINGLY, THE PROPOSED EQUITABLE APPORTIONMENT ACTION DOES NOT PRESENT A JUSTICIABLE CONTROVERSY.

The Court should recognize initially that in an equitable apportionment action, equitable right derives from the beneficial uses a state makes of the water of an interstate stream. Such a suit is appropriate, according to Justice Brandeis, when a river flows between two states "*and in each state the water is being used beneficially. . . .*" (*Hinderlider v. La Plata River & Cherry Creek D. Co.*, 304 U.S. 92, 101 (1938), emphasis supplied.) Only then "must (the waters of the river) be equitably apportioned between the two." (*Id.*). The phrase "equality of right" used throughout the cases refers not to proportionate

shares of water, but to the constitutional equality of states before this Court:

> One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, however, as in the case of *Missouri v. Illinois*, 180 U.S. 208, the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. [*Kansas v. Colorado*, 206 U.S. 46, 97-98 (1906)].
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> As was shown in *Kansas v. Colorado*, 206 U.S. 46, 100, such disputes are to be settled on the basis of equality of right. But this is not to say that there must be an equal division of the waters on an interstate stream among the States through which it flows. It means that the principles of rights and equity shall be applied having regard to the "equal level or plane on which all the States stand, in point of power and right, under our constitutional system. . . . [*Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931)].
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> What was said (in *Kansas v. Colorado*) about "equality of right" refers, as the opinion shows (p. 97), not to an equal division of the water, but to the equal level or plane on which all the States stand, in point of power and right, under our constitutional system. [*Wyoming v. Colorado*, 259 U.S. 419, 465 (1932)].

In this action Colorado would seek an apportionment of the Vermejo River despite the fact that she makes no diversion from it. This position is untenable for two reasons. First, equitable apportionment arises only from a balancing of the equities

derived from beneficial use. Secondly, there is no territorial right to equitable apportionment that arises from the presence of a stream within the boundaries of a state. Colorado's adherence to this territorial doctrine has been discredited because it ignores the equitable basis of apportionment.

In *Colorado v. Kansas,* 320 U.S. 383 (1943), the Court provided its most extensive discussion of the jurisprudential basis of equitable apportionment. The Court's opinion included a discussion of the apportionment created in *Kansas v. Colorado, supra.* The apportionment there was made on the basis of the established, permissible uses that existed under the respective water codes of the two jurisdictions, riparian and appropriation. Because Colorado would not be enjoined from diverting water from the Arkansas River until Kansas could prove quantifiable injury to its riparian rights, the uses derived from both systems were respected. Colorado users were therefore permitted to appropriate water to the extent that they did not interfere with Kansas's right to undiminished flows. In addition, the Court required that before "the developments in Colorado consequent upon irrigation were to be destroyed or materially affected, Kansas must show not merely some technical right but one which carried corresponding benefits." (320 U.S. at 385-86). Need to account for the actual uses from which the equities derived was emphasized twice more:

> (I)n determining whether one State is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one State or the other must be weighted as of the date when the controversy is mooted. (320 U.S. at 393-94).
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> * * *
>
> (T)he question to be decided, in the light of existing condition in both States, is whether, and to what extent, her action injures the lower State and her citizens by depriving them of a like, or an equally valuable, beneficial use. (320 U.S. at 393).

In a suit for an equitable apportionment the Court must balance equities derived from use. In this case, because Colorado possesses no beneficial uses, the Court could not do that. It would be asked to weigh the developed economy of northern New Mexico against the undeveloped economy of a small, uninhabited area of southern Colorado. It would be asked to weigh the specific against the hypothetical, or New Mexico's application of Vermejo water to beneficial use against Colorado's good intentions. How could such a division be made? Which vested New Mexico use would be judged inferior to Colorado's plans and on what basis? To attempt to make such a division would place the Court in the position rejected in *Colorado v. Kansas, supra.* There the Court indicated the manner in which a balancing of the equities is made. It is made "in the light of existing conditions in both states," according to an adjustment of "equally valuable" beneficial uses within them. Under such a standard, the absent Colorado uses could not be permitted to divest New Mexico's established ones. For this reason, taking Colorado's cause of action at face value, the Court is not presented with a justiciable controversy. A justiciable controversy arises only when a state asserts an interest that is cognizable at equity. *Cf., Missouri v. Illinois,* 200 U.S. 496 (1906); *New York v. New Jersey,* 256 U.S. 296 (1921); *North Dakota v. Minnesota,* 263 U.S. 365 (1933); *Connecticut v. Massachusetts, supra; Washington v. Oregon,* 297 U.S. 517 (1936); *Alabama v. Arizona,* 291 U.S. 286 (1934).

In *Alabama v. Arizona,* the Court was presented with an application for leave to file a complaint by the State of Alabama, asking that the Court invalidate statutes enacted by 19 different states regulating or prohibiting the sale of goods produced elsewhere by convict labor. In denying leave, the Court held in part:

> Plainly the amended bill does not meet the requirements that reasonably should be imposed upon the applicant. It fails to show that Alabama has any agreement with any defendant or that there is any direct issue between them or that the validity of the statutes in question and Alabama's assertion of right may not, or indeed will not, speedily and conveniently be tested by the contracting company, that apparently is directly concerned, or by a seller of such goods. *Cf., Louisiana v. Texas, supra,* pages 18, 22 of 176 U.S., 20 S. Ct. 251, 44 L. Ed. 347. There is no allegation that an adequate market for the goods in question may not be found outside the five states named. The facts alleged are not sufficient to warrant a finding that the enforcement of the statutes of any defendant would cause Alabama to suffer great loss or any serious injury. If filed, the bill would have to be dismissed for want of equity. *Florida v. Mellon,* 273 U.S. 12, 47 S. Ct. 265, 71 L. Ed. 511 (291 U.S. at 292).

By emphasizing the fact that Alabama could not demonstrate a contractual agreement that was impaired by the statutes in any of the 19 states or that Alabama could not sell her products elsewhere, the Court was making the point that the jurisdiction of the Court could be invoked only by facts which would justify judicial intervention. Because Alabama could present only speculative allegations and not facts, the Court held that the bill, if filed, would have to be dismissed for want of equity. The significance for the instant case is that Colorado can present no facts that show that New Mexico has interfered with Colorado's right to Vermejo water because she has never used any. Like Alabama, Colorado does not have a sufficient interest in the subject of the litigation to justify the intervention of the Court.

In *Washington v. Oregon, supra,* the issue was joined in an apportionment action similar to that in this case. In its statement of the case, the Court announced that it had granted leave to the State of Washington to file a complaint for the apportionment of "the interests of the two states in the river and in

tributary streams and restraining any use or diversion of the waters found to be unlawful." (297 U.S. at 518-19).

> We turn at this point to a consideration of the acts of appropriation, their nature and effect, in an endeavor to ascertain whether they were legitimate or wrongful. For more than fifty years before the filing of this suit irrigators in Oregon at seasons of shortage maintained crude or temporary dams across the Walla Walla River close to the Red Bridge. During the low water period the effect of the dam was to turn the waters of the river away from the channel of the Tum-a-lum into the channel of the Little Walla Walla, where they were used for agricultural, domestic and kindred purposes. A small quantity of water necessary to supply the right of the East Side Ditch has been permitted to go by the dam without interference. With that exception, which is negligible, all the waters have been diverted without interruption and without protest for more than fifty years. Was this a wrong to Washington? (297 U.S. at 522).

It is significant that both states possessed appropriations, although Washington's had been unused for fifty years. It was held that the situation did not engender "the high equity that moves the conscience of the Court in giving judgment between states." (297 U.S. at 523, citing *North Dakota v. Minnesota, supra; Connecticut v. Massachusetts, supra; Kansas v. Colorado,* 206 U.S. 46, 109). If the Court could not be moved to apportion waters where vested rights had once existed but had been lost through abandonment, *a fortiori* it cannot do so where there is an absence of any right at all. If Washington's failure to use interstate water for fifty years could not provide her with the requisite equitable interest to apportion the water, Colorado's absence of any uses cannot provide any equity to begin with. As Justice Cordozo wrote: "(W)hen these (beneficial uses) are shown to be lacking, the water right will fail or fail to the extent that equity requires." (297 U.S. at 527-528).

Colorado's lack of an assertable interest is evident from the allegations of her proposed Complaint. For example, allegation No. 14 states that it is essential to the protection of the state of Colorado and the welfare of its citizens that an apportionment be made so that "valid water rights in Colorado may utilize such share" (CF&I's paper right). Colorado does not ask that a particular amount be apportioned commensurate with specific Colorado water rights. The interest claimed is amorphous. Colorado asks instead for an indeterminate "equitable share" that its citizens may later utilize.

Colorado has no objective right to a division of the Vermejo based upon the fact that the river flows through her territory. To argue otherwise, as Colorado does by asking for an apportionment of the river despite her lack of beneficial uses, is to restate the position that Colorado possesses a territorial right to interstate water that may be asserted without regard to its effect on neighboring states with vested uses. Colorado has sued for apportionment of the Vermejo despite the fact that it is over-appropriated in New Mexico, therefore asking for a division of the river despite any effect that this may have on New Mexicans. It marks the third time that the argument has appeared before the Court.

In *Kansas v. Colorado, supra,* Colorado took the position that each state possesses a territorial right to the waters within its borders and therefore may dispose of them at will, without regard to the effect on its neighbors. The argument was specifically addressed by the Court in *Wyoming v. Colorado, supra.* It was dismissed as follows:

> The contention of Colorado that she as a State rightfully may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, cannot be maintained. The river throughout its course in both States is but a single stream wherein each State has an interest which should be respected by the other. A like contention was

> made in *Kansas v. Colorado* and was adjudged untenable. Further consideration satisfies us that the ruling was right. It has support in other cases, of which *Rickey Land & Cattle Co. v. Miller & Lux*, 218 U.S. 258; *Bean v. Morris*, 221 U.S. 458; *Missouri v. Illinois*, 180 U.S. 208, and 200 U.S. 496, and *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, are examples. (259 U. S. at 466).

In this case Colorado would make the same argument, but from a less obvious standpoint than on the first two occasions. Instead of making diversions and then defending expressly with the theory that she is entitled to do what she wants with water within her territorial bounds, she is asking the Supreme Court to implicitly validate this principle for her. The effect of a decree of equitable apportionment giving Colorado rights to the Vermejo at a time when the river is over-appropriated in New Mexico would endorse the previously rejected contention of Colorado that she need not respect the rights of water users in other states. The reason for this is simple. If an apportionment could be awarded a state without beneficial uses in a situation in which all the available water has been appropriated by the other state, the Court would in fact not have taken those uses into account by making an apportionment between the two.

The Court should carefully consider Colorado's position in this alleged apportionment action, both from the standpoint of the effect on New Mexico users and from the perspective of the holdings in *Kansas v. Colorado* and *Wyoming v. Colorado, supra.* Additional consideration should be given to *Nebraska v. Wyoming, supra,* in which in discussing the factors which the Court would consider in reaching an apportionment of interstate water, Justice Douglas organized the opinion around the respect that the Court would accord to the intrastate development derived from that water:

> A mass allocation was made in *Wyoming v. Colorado.* But there is no hard and fast rule which requires it in all cases.

> The standard of an equitable apportionment requires an adaptation of the formula to the necessities of the particular situation. We may assume that the rights of the appropriators inter se may not be adjudicated in their absence. But any allocation between Wyoming and Nebraska, if it is to be fair and just, must reflect the priorities of appropriators in the two States. Unless the priorities of the downstream canals senior to the four reservoirs and Casper Canal are determined, no allocation is possible. The determination of those priorities for the limited purposes of this interstate apportionment is accordingly justified. The equitable share of a State may be determined in this litigation with such limitations as the equity of the situation requires and irrespective of the indirect effect which that determination may have on individual rights within the State. *Hinderlider v. La Plata Co.*, 304 U.S. 92, 106-108. . . . (325 U.S. at 627).

Each factor contemplates the reconciliation of competing uses and equities in more than one state. They presume competition between interests developed from beneficial use. A mere assertion of sovereign interest is insufficient. Because Colorado can claim only that, leave to file her complaint should be denied.

POINT III

COLORADO LACKS STANDING TO SUE FOR AN EQUITABLE APPORTIONMENT OF THE VERMEJO RIVER BECAUSE SHE MAKES NO BENEFICIAL USES FROM IT. SHE THEREFORE SUFFERS NO INJURY FROM NEW MEXICO'S ESTABLISHED USES.

The "gist of the question of standing," the Court said in *Baker v. Carr*, 369 U.S. 186 (1962), is whether the plaintiff has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the

presentation of issues upon which the Court so largely depends for illumination of difficult questions." (369 U.S. at 204).

In Point II we discussed Colorado's inability to assert a justiciable interest in the waters of the Vermejo. It follows that Colorado cannot assert injury to an interest if she possesses none. Because Colorado makes no appropriations from the Vermejo, she has no interests that are jeopardized by diversions in New Mexico and therefore has no interests that are injured by New Mexico.

This is apparent from the proposed complaint. Colorado can only advance the notion that she is equitably entitled to a share of the Vermjeo by discussing her claims amorphously. No specific injury to identifiable water uses can be alleged.

The Court has treated the standing requirements for suits between states differently than in suits between private parties. It has held that it will not take jurisdiction of interstate suits in the absence of absolute necessity, that the damages must be actual and imminent rather than speculative, and that they be "clearly shown" to be of "serious magnitude." Colorado can posit none of these requirements.

In *Alabama v. Arizona, supra,* the Court addressed issues pertaining to jurisdiction in original actions. Although the standing question was not identified as such, the Court's opinion in this respect focused on Alabama's failure to allege facts that would have established an invasion of an interest legally cognizable in the Court's original jurisdiction. The Court held:

> (Our) jurisdiction in respect of controversies between states will not be exerted in the absence of absolute necessity. *Louisiana v. Texas,* 176 U.S. 1, 15, 20 S. Ct. 251, 44 L. Ed. 347. A state asking leave to sue another to prevent the enforcement of laws must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor. Our decisions definitely establish that not every matter of sufficient moment to

> warrant resort to equity by one person against another would justify an interference by this court with the action of a state. *Missouri v. Illinois,* 200 U.S. 496, 520, 521, 26 S. Ct. 268, 50 L. Ed. 572; *New York v. New Jersey,* 256 U.S. 296, 309, 41 S. Ct. 492, 65 L. Ed. 937; *North Dakota v. Minnesota,* 263 U.S. 365, 374, 44 S. Ct. 138, 68 L. Ed. 342. Leave will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent. *Missouri v. Illinois, supra,* page 521 of 200 U.S., 26 S. Ct. 268, 50 L. Ed. 572. (291 U.S. at 291-292).

In this case, Colorado's complaint manifestly fails to show any facts which create an "absolute necessity" for the relief requested. It is true that paragraph No. 14 of the complaint states that it is essential for the welfare and protection of the state that an apportionment of the Vermejo be made, but this is not a fact. It is a statement of Colorado's opinion. The factual allegations of the complaint only serve to illustrate the underlying basis for this opinion – that Colorado makes no usage of Vermejo waters. Although Colorado insists that this situation demands the inference that an apportionment should be made, under *Alabama v. Arizona, supra,* the opposite is true. The absence of any beneficial use in Colorado means that there is not a sufficiently injurable interest for which relief is "absolutely necessary."

In cases in the Court's original jurisdiction, as in the case of suits between private parties, a state must show its injuries to be direct and imminent rather than speculative. *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923); *Florida v. Mellon,* 273 U.S. 12 (1927). This principle was a factor in both decisions, the former case reaching a decision on the merits and the latter denying jurisdiction. In *Florida v. Mellon,* a case in which the state sought to enjoin the Secretary of the Treasury and the Commissioner of Internal Revenue from attempting to collect federal inheritance tax, Justice Sutherland denied leave to file the complaint:

no cognizable injury as a quasi-sovereign by New Mexico's continuing uses of that water.

On the other hand, in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), cited in *North Dakota v. Minnesota*, the Court recognized Georgia's standing to enjoin the spread of noxious fumes by a factory in another state because of the nuisance it represented to a definable class of Georgia citizens. In his opinion, Justice Holmes wrote that the state suffered sufficient injury in its capacity as a quasi-sovereign to receive equitable protection on behalf of her citizens from the alleged injury. In *Missouri v. Illinois*, 200 U.S. 496 (1906), the Court recognized Missouri's standing to sue Illinois on a similar theory because deposits of typhoid in an interstate stream represented a health hazard to Missouri citizens. In *Pennsylvania v. West Virginia, supra*, the Court overturned a West Virginia statute prohibiting the shipment of natural gas at a time when the citizens of Pennsylvania had become dependent on it. The Court found the interests threatened by the West Virginia law to be sufficiently concrete to justify intervention. They derived from actual uses made of the gas and from the equities derived therefrom because there were demonstrable uses of West Virginia gas by the plaintiffs:

> The attitude of the complainant States is not that of mere volunteers attempting to vindicate the freedom of interstate commerce or to redress purely private grievances. Each sues to protect a two-fold interest – one as the proprietor of various public institutions and schools whose supply of gas will be largely curtailed or cut off by the threatened interference with the interstate current, and the other as the representative of the consuming public whose supply will be similarly affected. Both interests are threatened with serious injury. (262 U.S. at 591).

The same cannot be said of the injury that Colorado has alleged in this action. She claims a right to secure "a certain equitable share" of waters from the Vermejo. (Complaint,

> Plainly, there is no substance in the contention that the state has sustained, or is immediately in danger of sustaining, any direct injury as the result of the enforcement of the act in question. See *In re Ayers*, 123 U.S. 443, 496; *Massachusetts v. Mellon*, 262 U.S. 447, 488 (273 U.S. at 18).

Nor is there in the instant case. Action by the Court in denying Colorado's motion for leave to file her complaint, by recognition of New Mexico's existing uses, will not directly injure Colorado. It will only preserve the respective economies of southern Colorado and northern New Mexico as they have existed for over one hundred years. It is true that if leave is denied by the Court in order to protect New Mexico's uses, CF&I will not be able to pursue her plans for development. But this will not injure an actual Colorado interest. It will only frustrate her plans, the benefits of which are necessarily speculative and beyond the protection of this Court.

In interstate suits in the Court's original jurisdiction, the plaintiff state has always been able to prove a specific, non-hypothetical injury to an identifiable interest. In *North Dakota v. Minnesota, supra,* the Court discussed the nature of such litigation:

> The jurisdiction and procedure of this Court in controversies between States of the Union differs from those which it pursues in suits between private parties. This grows out of the history of the creation of the power, in that it was conferred by the Constitution as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force. The jurisdiction is therefore limited generally to disputes which, between states entirely independent, might be properly the subject of diplomatic adjustment. They must be suits "by a state for an injury to it in its capacity of quasi-sovereign." (263 U.S. at 372-73).

In the case at bar there has been no application to beneficial use of Vermejo waters in Colorado. Colorado, therefore, suffers

paragraph No. 12). She claims that it is "essential to the protection of the State and the welfare of its citizens" that she receive a share of the fully appropriated waters of the Vermejo (Complaint, paragraph No. 14). No actual allegation of injury is presented by these paragraphs. They contain only the suggestion of inequitable conduct by New Mexico, and they are therefore insufficient to invoke the jurisdiction of the Court.

In a series of cases construing the Court's original jurisdiction, the Court has imposed a stricter standing requirement in suits in its original jurisdiction as opposed to those in its appellate jurisdiction. Two prerequisites must be met: a specific injury of "serious magnitude" that is "fully and clearly proved." *Alabama v. Arizona, supra; North Dakota v. Minnesota, supra; Colorado v. Kansas, supra; Connecticut v. Massachusetts, supra; Washington v. Oregon, supra; New York v. New Jersey, supra.* Typically, the Court has said:

> In such action by one State against another, the burden on the complainant State of sustaining the allegations of its complaint is much greater than that imposed upon a complainant in an ordinary suit between private parties. "Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of *serious magnitude* and it must be established by *clear and convincing evidence.*" *New York v. New Jersey,* 256 U.S. 296, 309; *Missouri v. Illinois,* 200 U.S. 496, 521. (263 U.S. at 374, emphasis supplied).
>
> * * *
>
> Before this court ought to intervene, the case should be of *serious magnitude, clearly and fully proved,* and the principle to be applied should be one which the court is prepared deliberately to maintain against all consideration on the other side. See *Kansas v. Colorado,* 185 U.S. 125. (200 U.S. at 521, emphasis supplied).

This standard has been decisive in several apportionment actions. In *Connecticut v. Massachusetts, supra,* it was applied

to an injunction action by the state of Connecticut against proposed diversions by Massachusetts and resulted in the dismissal of Connecticut's complaint:

> The exceptions filed by Connecticut need not be set forth or considered in detail. The governing rule is that this Court will not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence. *New York v. New Jersey*, 256 U.S. 296, 309. *Missouri v. Illinois*, 200 U.S. 496, 521. The burden on Connecticut to sustain the allegations on which it seeks to prevent Massachusetts from making the proposed diversions is much greater than that generally required to be borne by one seeking an injunction in a suit between private parties. *North Dakota v. Minnesota*, 263 U.S. 365, 374. There has been brought forward no adequate reason for disturbing the master's findings of fact. (282 U.S. at 669).

Although *Connecticut v. Massachusetts* involved an action between two riparian jurisdictions, the principle can be applied to the facts in this case involving a similar action between two appropriation states. The fact that Colorado appropriators have historically made no beneficial uses from the Vermejo removes the level of injury that the state can assert from that which can be established "by clear and convincing evidence." In fact, Colorado can assert no specific injury at all. At most she would argue that future plans for development will be frustrated. Because plans by their very nature must remain speculative and hypothetical until their development, Colorado cannot adduce evidence necessary to meet the *Connecticut v. Massachusetts* standard for actions in the original jurisdiction and certainly cannot prove that New Mexico's continuing use of Vermejo water is an invasion of her rights of "serious magnitude."

The same principle appears in *Washington v. Oregon, supra:*

> "Before this Court can be moved to exercise its extraordinary power under the Constitution to control the

> conduct on one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence." *New York v. New Jersey,* 256 U.S. 296, 309; *North Dakota v. Minnesota,* 263 U.S. 365, 374; *Connecticut v. Massachusetts,* 282 U.S. 660, 669; *Missouri v. Illinois,* 200 U.S. 496, 521. The Master has found: "There is no satisfactory proof that to turn down water past the Red Bridge in Oregon during the period of water shortage would be materially more advantageous to Washington users than to permit such water to be applied to surface irrigation in Oregon." (297 U.S. at 522).

The fact that Colorado possesses no beneficial uses and therefore cannot meet the standing requirements for interstate suits in original jurisdiction, gives the Court an opportunity to see the real nature of this action. It is the most complete assertion of the territorial doctrine yet to appear before this Court. Colorado makes no uses of Vermejo water, has no interest in the river beyond its expectations, suffers no demonstrable injury, and yet demands that she receive a share because the river flows through Colorado. As we have indicated, this theory was rejected in two previous cases: *Kansas v. Colorado* and *Wyoming v. Colorado.* It should be rejected now.

POINT IV

IF COLORADO'S COMPLAINT RAISED ISSUES JUSTICIABLE AS AN EQUITABLE APPORTIONMENT, IT WOULD BE BARRED BY LACHES; STRIPPED OF ITS EQUITABLE RHETORIC, HOWEVER, THE PROPOSED COMPLAINT RECITES NOTHING BEYOND THE PRIVATE LEGAL RELATIONSHIPS PROPERLY COGNIZABLE IN THE PENDING LITIGATION IN THE 10TH CIRCUIT COURT OF APPEALS.

In *Washington v. Oregon, supra,* the State of Washington sought an apportionment of the waters of the Walla Walla River.

The facts were not unlike those presented here. In both cases the plaintiff state could not assert equities derived from present beneficial uses. Nevertheless, Washington's position was stronger than that of Colorado in this case. Washington sought to have apportioned to her a quantity of water derived from previous uses which had been abandoned for over forty years. The Court disposed of the claim on grounds of laches:

> 'To limit the long established use in Oregon would materially injure Oregon users without a compensating benefit to Washington users.' These findings are well supported by the evidence. Complainant has brought forward no adequate reason for disturbing them. *Connecticut v. Massachusetts, supra,* at p. 669. Accepting them, as we do, we accept also the conclusion to which they point with inescapable directness. To restrain the diversion at the bridge would bring distress and even ruin to a long established settlement of tillers of the soil for no other or better purpose than to vindicate a barren right. This is not the high equity that moves the conscience of the Court in giving judgment between states. *North Dakota v. Minnesota, supra; Connecticut v. Massachusetts, supra; Kansas v. Colorado,* 206 U.S. 46, 109. Far from being that, it is rather "the *summum jus* of power." *Mutual Life Insurance Co. v. Johnson,* 293 U.S. 335, 339. In default of reasons for removal more urgent and compelling, the tillers of the soil will be left where they have settled. Cf., *Hough v. Porter,* 51 Ore. 318, 415; 95 Pac. 732; 98 Pac. 1083; 102 Pac. 728; *Matheson v. Ward,* 24 Wash. 407, 411; 64 Pac. 520. (297 U.S. at 523).

In this case Colorado can present the Court with no history of use at all, while New Mexico users have fully appropriated the river, with vested rights extending back 100 years. If Washington has waited too long to predicate an apportionment on rights which had died, Colorado has waited too long to predicate an apportionment on rights which have been conceived but are still unborn.

The Court's decision in *Washington v. Oregon* is compelling because to reject it would be to say that equity can be derived from the total absence of rights in Colorado while no equity can be derived from abandoned rights in Washington. Logic is not susceptible of such a distinction, and the Court should not accept this case to create one. Indeed, the holding in *Washington v. Oregon* can admit of only one result in this action. Colorado should not be given leave to file her complaint.

Colorado can advance no equitable precedent for apportioning the Vermejo, and the Court could protect no equitable interest by doing so. The only real and undisguised cause of action arising from the history of Vermejo development is generated by CF&I's threatened diversion of waters that historically have been applied to beneficial use by New Mexico users. That action was filed (*Kaiser Steel Corporation et al. v. CF&I Steel Corporation,* Civil No. 76-244, D.N.M. 1978), and the court enjoined CF&I. An appeal is pending before the 10th Circuit Court of Appeals (*Kaiser Steel Corporation et al. v. CF&I Steel Corporation,* 10th Cir. No. 78-1193), and it is appropriate that the 10th Circuit resolve any issues that remain.

CONCLUSION

Article III, Section II provides the constitutional foundation for the Court's original jurisdiction:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls: – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – (and) to Controversies between two or more states. . . .

But it provides no more than that. There remained for the Court the job of shaping its original jurisdiction in such a way

as to allow for the most effective presentation of issues between competing states. It has not done so lightly. As we have attempted to show, the Court has erected barriers to justiciability and standing beyond those required of private litigants, to separate occasions of conflict from those of cognizable legal controversy in interstate disputes.

There is a conflict here. Competition for water in an arid region makes that inevitable. But there is no legal controversy. Colorado's non-use of Vermejo water makes that inescapable.

Colorado and New Mexico share a sense of equity that is reflected in the jurisprudential underpinnings of the doctrine of prior appropriation in each state. In neither state would a court grant a new appropriation on a fully appropriated stream. According to mutually familiar principles, such an appropriation would contradict the essential feature of each state's water laws, creating economic confusion and social uncertainty. Priority of appropriation would be rendered meaningless.

In circumstances where competing demands on an interstate stream have overtaken supply, local law may not accommodate an orderly or fair division between states. In response to such politically unmanageable situations, the Court has fashioned the doctrine of equitable apportionment and necessarily undertaken the burden of weighing the competing equities on a finite scale. Here there is no politically unmanageable situation, no clash of interests in interstate waters sufficient to importune the attention of the Court.

CF&I's proposed trans-mountain diversion posed a threat to private interests in New Mexico, and the federal district court, clothed with the appropriate jurisdiction, enjoined CF&I from any out-of-priority use of Vermejo waters. If this Court were now to entertain Colorado's proposed complaint it would provide the opportunity for CF&I to pull itself up by its own bootstraps, to acquire indirectly what it could not legitimately

acquire under principles of prior appropriation. To accept Colorado's complaint would be not only to give birth to, but to recognize as fully mature the embryonic right of CF&I. To permit the exercise of this right would make a mockery of prior appropriation and work a fraud upon the equity jurisdiction of the Court.

At present there is no diversion and use of Vermejo waters in Colorado – only the vulgar ambitions of CF&I. On principles of equity and fairness long embodied in the water law of both states, the federal district court has already addressed the only viable controversy on the river. Ignoring her own sense of equity, Colorado would call upon the conscience of the Court to imagine a controversy in order to convert the waters of the Vermejo to the use of CF&I. Such a design should not generate the respect and dignity of the Court. As a constitutional matter, there is no reason to entertain the proposed complaint.

Respectfully submitted,

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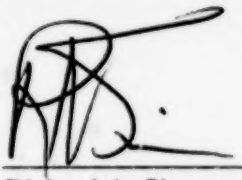
CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify, pursuant to Rule 9(3) and Rule 33(3) of the Rules of the Supreme Court of the United States, that on the 11th day of October, 1978, I served the requisite number of copies of the foregoing Brief in Response to Motion for Leave to File Complaint, by first class mail, on the Governor and the Attorney General of the State of Colorado.



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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 80, Original

THE STATE OF COLORADO,
Plaintiff,

v.

THE STATE OF NEW MEXICO,
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE
OF NEW MEXICO,
Defendants

REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

SUPPLEMENTAL STATEMENT OF FACTS

The purpose of this supplemental statement is to set forth additional factual data which is relevant to statements in the brief of the State of New Mexico and to correct certain statements made in that brief.

This proceeding was undertaken by the State of Colorado pursuant to recommendations of its Colorado Water Conservation Board. The duties of that Board are set forth in the Colorado statutes, Colorado Revised Statutes 1973, title 37, article 60. Among these duties is that of protecting and asserting the interests of the State and its citizens with respect to the waters of interstate streams. In the arid regions of the Rocky Mountain West such as the region involved in this proceeding the public welfare of communities and states is inextricably bound and related to the usage of water by private citizens, by corporations and by public entities such as municipalities. The State of New Mexico in its brief at page 5 derisively says: "What's good for CF&I is good for Colorado." (Hereafter the CF&I Steel Corporation, a Colorado corporation, will be referred to as "CF&I".) This, in fact, is often true just as what is good for any other water right owner in Colorado would be good for the State. A review of the uses of water as set forth in the judgment and decree awarding the CF&I water right, i.e., irrigation, domestic, industrial, recreational and for power generation, reveals the very great public interest. The interest of Colorado in having its water resources, placed to those beneficial uses by CF&I would be no less than the interest of the State of New Mexico in the corporations it seeks to protect, i.e., Kaiser Steel Corporation, Phelps-Dodge Corporation and Vermejo Park Corporation, a wholly owned subsidiary of the Pennzoil Company.

On page 2 of its brief, the State of New Mexico states that an economy has developed from the usage of the waters

of the Vermejo River in New Mexico and that the river is "fully appropriated". Questions about the development of regional economies and as to whether or not the river is fully appropriated and the particular relevancy of such to equitable apportionment will have to be determined by the development of facts in this proceeding.

The State of New Mexico in referring (pp. 2-4, New Mexico brief) to the adjudication proceeding in Colorado which resulted in the award of a water right to CF&I has chosen to dwell at length on a ruling of the water referee which was superceded after reconsideration and replaced by an entirely different ruling which then was incorporated as the judgment and decree of the District Court In And For Water Division No. 2 of the State of Colorado. This amended ruling of the referee, in fact, found that the waters in question are in the drainage basin of the Arkansas River and, therefore, in Colorado Water Division No. 2. It then went on to list the uses to which the water would be put, which uses are mentioned above. By replacing his original ruling with his new and amended ruling which then became the judgment and decree of the court, the water referee concluded that the uses were not speculative and did constitute a bona fide conditional appropriation upon which a conditional water right could be based.

The State of New Mexico emphasizes the referee's initial ruling. The State of Colorado would point out that Colorado Revised States 1973, §37-92-203 provides for the appointment of "referees" by the Colorado water judges to assist in the processing of applications for water rights. A review of the statutory scheme contained in Colorado Revised States 1973, §37-92-302 to §37-92-304 makes it abundantly clear that the referee's ruling is only one step in the process and is subject to review and modification by the actual water judge prior to the issuance of a final decree.

On page 5 of its brief, the State of New Mexico says that there are "no actual appropriations" in Colorado. As will be indicated later, the steps taken to secure the conditional water right decreed by the Colorado District Court do, in fact, constitute the initiation of appropriations. This was recognized by the New Mexico water claimants in their United States District Court proceeding referred to below. In their complaint, and in other documents, they state that the defendant, CF&I Steel Corporation, "has commenced an appropriation" of water in Colorado. Indeed that was the entire basis for the injunctive action in the United States District Court.

The proceeding in the United States District Court for the District of New Mexico, i.e., *Kaiser Steel Corporation et al. v. CF&I Steel Corporation,* (Civil No. 76-244 D.N.M. 1978), is interesting in relation to the involvement of the State of New Mexico which moved to appear as amicus curiae stating that New Mexico "has both governmental and proprietary interests" in the Vermejo River and that it is a function of the New Mexico Interstate Stream Commission "to protect the interests of the State of New Mexico in such streams." The motion then went on to ask that the State of New Mexico be permitted to appear "for the purpose of ensuring that this Court is promptly and reliably informed as to the status of interstate meetings and/or negotiations, if any, as to the waters of the Vermejo River, and for such other purposes as may be appropriate to enable the Court to adjudicate this cause of action." The motion was granted.

When the State of Colorado sought to appear in the New Mexico proceeding it stated that a portion of the waters of the Vermejo River in Colorado "are subject to a valid decree of the Colorado water courts and the movant has a strong interest in the protection of its courts and their decrees" and further stated that it sought to appear "to inform the Court of possible legal proceedings to ensure that the decrees of her

(Colorado's) courts are protected and that a proper apportionment of the interstate waters of the Vermejo River is achieved", interstate compact negotiations having been terminated by the State of New Mexico. Colorado was denied the right to appear. In that proceeding, the judge issued an injunction by way of summary judgment precluding diversions in Colorado.

The State of New Mexico, as indicated, apparently considered the interstate negotiations a matter of great importance. It insisted that it come into the United States District Court proceeding so that the court could be fully advised in regard to these negotiations. It participated in a full day of negotiations involving presentations by all parties concerned, deliberations, and finally termination by the State of New Mexico. The State of Colorado urged that the negotiations continue and that in the interest of resolving the various rights and claims with respect to the waters of the interstate stream a program of stream measurement be undertaken so that the parties would know exactly what they were talking about.

On page 7 of its brief, New Mexico says "Colorado seeks not an equitable apportionment, but rather an avaricious apportionment". It is respectfully suggested that avaricious is a term no more applicable to Colorado than to New Mexico in this case in that each state is seeking to protect the valid rights of its citizens. If, however, the word avaricious were applicable, it would seem more so to the State of New Mexico which seeks to preclude *any* usage by Colorado of the waters in this interstate stream.

THE NATURE OF A COLORADO WATER RIGHT

The State of New Mexico in its brief continuously refers to the Colorado water right that was granted to CF&I, as set forth above, as an "inchoate right" or a "paper right." New

Mexico apparently seeks to imply that it is not a right which would be recognized or which has any current strength or validity. Why New Mexico would not simply refer to the right as a conditional water right so that this Court would be properly informed is not clear.

Colorado, as do most western states, follows the doctrine of prior appropriation with respect to the use of the water from streams. Under the doctrine in Colorado two types of water rights may be awarded, a conditional water right and a water right. These terms are defined in Colorado statutes, Colorado Revised Statutes 1973, §37-92-103.

The purpose of a conditional water right, which is the type of water right awarded to CF&I in the proceeding referred to above, is to provide a certainty as to the right to use water upon the completion of a project for the development of such use. It is a procedure particularly appropriate, for example, with respect to the acquisition of water rights for large municipal projects involving considerable expense wherein the municipality desires to be sure that if it completes the project it will have a water right for the particular water involved. Thus, a municipality or other claimant would go into court, present its plans for development and secure a conditional water right which in effect would say that the claimant is presently assured that it may use water under a given priority date if it completes its project with reasonable diligence. Upon the completion of the project, the "conditional water right" is then converted to a "water right."

There is no question but that a conditional water right is a vested water right that is firm and clear and specific as to its terms, conditions and details and not inchoate. It is a right which cannot be taken away by any official or any other claimant unless the owner of the conditional water right fails to complete the project with reasonable diligence.

The statutory law of Colorado with respect to conditional water rights is largely found in Colorado Revised Statutes 1973, title 37, article 92. A review of Part 4 of that article, entitled "Publication of Priorities," makes it abundantly clear that water rights and conditional water rights are treated equally and tabulated jointly for purposes of water administration. *See* Colorado Revised Statutes 1973, §37-92-401.

The State of New Mexico in its brief (p. 17) refers to the case of *Washington v. Oregon*, 297 U.S. 517 (1936), wherein this Court held that because a water right in the State of Washington had not been used for 50 years it had been abandoned and, therefore, would not be recognized as a vested right entitled to consideration in an equitable apportionment controversy between the two states. The complete distinction between that case and this case is that Washington by reason of its abandonment of a water right in effect had no water right, whereas Colorado has a vested right, *i.e.*, the conditional water right decreed to CF&I.

The concept of abandonment is used in different ways in different states, but essentially it means that a water right which has been acquired by appropriation, being a right to use a certain portion of the waters of a stream, may be completely lost by a failure to use such right for an extended period of time. Once this has taken place the water right has been abandoned and there is legally no water right at all. Thus, in the *Washington v. Oregon* case, Washington has no water right. In this case, Colorado has a valid vested water right.

WATER RIGHT v. WATER USE

The one contention that the State of New Mexico is really making in its brief, a contention which occurs in almost every section, is that because there has been no water use in Colorado, Colorado is precluded from claiming any

equitable right to any portion of the waters of the Vermejo River notwithstanding the fact that these waters originate in Colorado. New Mexico acknowledges, as indeed it must under *Nebraska v. Wyoming*, 325 U.S. 589 (1945), that priority of appropriation alone does not control as between the rights of two states on an interstate stream and that, therefore, if there was a water use in Colorado even under a water right junior to New Mexico water rights there could and should be consideration of equitable apportionment. This contention of the State of New Mexico that there must be water use and not just a water right is wrong generally and it is particularly wrong in relation to the facts of this case.

The general wrong is that a Colorado water right is a vested property right which is entitled to protection as any other property right. *Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, 304 U.S. 92, 102 (1938). Since it is a property right any consideration of the rights of states in and to the waters of a stream must necessarily account for it. Water use is simply an aspect of a water right or a conditional water right. The right to use is just as firm with respect to a conditional water right as it is with respect to a water right. In the case of a water right, the right to use may be lost by abandonment, *i.e.*, a particular period of non-use. In the case of a conditional water right, the right to use may be lost by a failure to diligently proceed with its full development. In either case it is an absence of activity for a significant period of time.

The particular wrong in this case is that the summary judgment entered by the United States District Court in New Mexico precludes usage of water in Colorado under the water right decreed by the Colorado court. (See New Mexico brief, p. 6). Thus, Colorado by court decree is precluded from using the water which use New Mexico now says is essential to any right to equitable apportionment. In the New Mexico United States District Court case the court said that it could not consider equitable apportionment and that it could only

determine the case on the basis of priority of appropriation. Now in the Supreme Court, New Mexico acknowledges that priority of appropriation is not the controlling factor as to equitable apportionment, and asserts that only actual usage of the water can be considered in equitable apportionment. In short, the argument is circular.

A STATE SITUATED ON AN INTERSTATE STREAM HAS THE RIGHT TO AN EQUITABLE APPORTIONMENT OF THE WATERS OF THAT STREAM

The case of *Nebraska v. Wyoming*, *supra*, is perhaps the most basic decision of this Court with respect to the rights of states to an equitable apportionment of the waters of an interstate stream and with respect to the proposition that priority of appropriation will not alone control. However, it is most interesting that several of the other cases cited by New Mexico in its brief stand for this same proposition. For example, *Connecticut v. Massachusetts*, 282 U.S. 660 (1931), (p. 13 of New Mexico's brief) says that disputes as to interstate waters "are to be settled on the basis of equality of right" but that this does not mean "there must be an equal division of the waters on an interstate stream." Another significant quote is from the case of *Wyoming v. Colorado*, 259 U.S. 419 (1922) (p. 18 of New Mexico's brief) wherein it was said: "The river through its course in both States is but a single stream wherein each State has an interest which should be respected by the other."

An acknowledgement by the State of New Mexico of the relevance and propriety of equitable apportionment with respect to the waters of the Vermejo River is in the interstate negotiations which took place and the need that the State of New Mexico saw to protects its interest by advising the United States District Judge for the District of New Mexico with respect to such negotiations. The State of New Mexico participated in two meetings with representatives of the

State of Colorado for the sole purpose of discussing equitable apportionment.

New Mexico at page 8 of its brief would suggest that there is something unusual about an upstream state instituting a proceeding in the Supreme Court for equitable apportionment of the waters of a stream. There is nothing in the case law on equitable apportionment which limits actions of this sort to those brought by a downstream state.

COLORADO SEEKS A DAY IN COURT

All that Colorado seeks in this proceeding is its day in court on the question of equitable apportionment. The United States District Court for the District of New Mexico declined to look into the question of equitable apportionment, interstate negotiations with respect to equitable apportionment have been terminated unilaterally by New Mexico, and the only forum that is available or appropriate to settle this matter is this Court.

No facts have been developed, no evidence has been adduced in any proceedings that bear specifically and directly on the equities. With respect to the waters of this interstate stream and the equitable apportionment thereof, the case in the United States District Court for the District of New Mexico turned solely on the priority of appropriation and was disposed of by summary judgment. Many facts were discussed in the interstate negotiations but there was no judge or jury. One side concluded that it was not in its interests to continue.

In the case of *Connecticut v. Massachusetts, supra*, cited on p. 26 of New Mexico's brief, it is said that there must be "clear and convincing evidence" and that is precisely what we are seeking here. In that case there had been findings of a master appointed to look into the facts and develop the

evidence. Were this Court to turn down Colorado's request to file a complaint without any development of the facts or evidence pertaining to equitable apportionment, such would indeed be a denial of Colorado's rights under the Constitution and the cases cited even by New Mexico in its brief.

What New Mexico is here asking in its brief is that this Court on the basis of statements made in that brief and without any real development of facts as to water rights and water uses in New Mexico, turn down Colorado's request for a hearing. It may be that this court will conclude that Colorado is entitled in equity to less water than it claims. But at the present time there is no factual basis in terms of "clear and convincing evidence" on which to determine the equities of equitable apportionment.

Colorado believes that by virtue of its position and status on this interstate stream it is entitled to have its citizens use a portion of the waters thereof notwithstanding uses that may be taking place in New Mexico. Colorado respectfully submits that one state cannot by claiming under its laws, water rights and uses for the entire flow of the stream preclude another state situated on that stream from claiming with propriety certain rights. The controlling principle was well stated in *New Jersey v. New York*, 283 U.S. 336, 342 (1931), as follows:

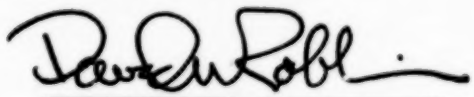
> It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of and interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the River might come down to it undiminshed. Both States have real and substantial interests in the River that must be reconciled as best as they may be.

It was suggested by New Mexico in its brief (pp. 10, 11) that Colorado is simply seeking by this action to set aside the injunction that was issued by the United States District Court for the District of New Mexico. This Court has enjoined private litigation such as that in connection with its consideration of equitable apportionment between the states as in *Colorado v. Kansas*, 320 U.S. 383 (1943). The objective of Colorado is to obtain its equitable portion of the waters of the Vermejo River. Such equitable portion can only be established by decision of this Court after a complete investigation of all the facts that pertain to the equities. Any judgment of the United States District Court for the District of New Mexico or of any other court would be subject to the judgment of this Court establishing such equitable apportionment and it is only in that sense that Colorado seeks to affect the judgment of the United States District Court for the District of New Mexico. Setting aside that judgment alone, whether accomplished by the 10th Circuit Court of Appeals on appeal or by this Court, will not solve the problem. It is only by means of this original proceeding between Colorado and New Mexico that equitable apportionment can be achieved and the interstate controversy resolved.

CONCLUSION

The motion for leave to file the complaint in this cause should be granted.

J. D. MacFARLANE
Attorney General of Colorado



DAVID W. ROBBINS
Deputy Attorney General of Colorado

Attorneys for Plaintiff
1525 Sherman Street, 3rd Floor
Denver, Colorado 80203
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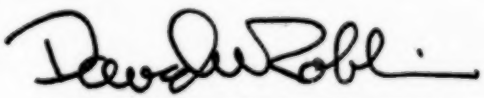
PROOF OF SERVICE

I, DAVID W. ROBBINS, Deputy Attorney General, State of Colorado, one of the Attorneys for the Complainant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the first day of November, 1978, I served copies of the foregoing Reply Brief in Support of Motion for Leave to File Complaint, by first class mail, postage prepaid, to the Office of the Governor and Attorney General, respectively, of the State of New Mexico.



DAVID W. ROBBINS
Deputy Attorney General
State of Colorado

FILED
JAN 24 1979
MICHAEL RODAK, JR., CLERK

No. 80, Original

IN THE

Supreme Court of the United States

October Term, 1977

STATE OF COLORADO, *Plaintiff*

v.

STATE OF NEW MEXICO,
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE OF
NEW MEXICO, *Defendants*

ANSWER AND MOTION TO REFER TO SPECIAL MASTER

JEFF BINGAMAN,
Attorney General of New Mexico

RICHARD A. SIMMS,
Special Assistant Attorney General

JAY F. STEIN,
Special Assistant Attorney General

G. EMLEN HALL,
Special Assistant Attorney General

Water Resources Division
Bataan Memorial Building
Santa Fe, New Mexico 87503

January 22, 1979

VERGARA PRINTING CO. - SANTA FE, NEW MEXICO

IN THE

Supreme Court of the United States

October Term, 1977

No. 80, Original

STATE OF COLORADO, *Plaintiff*

v.

STATE OF NEW MEXICO,
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE OF
NEW MEXICO, *Defendants*

ANSWER AND MOTION TO REFER TO SPECIAL MASTER

ANSWER

The defendants, the State of New Mexico and Jeff Bingaman, successor to Toney Anaya, Attorney General of the State of New Mexico, pursuant to the Court's order of November 27, 1978, in answer to the State of Colorado's Complaint, state:

1. The allegations in paragraphs one through three are admitted.

2. The defendants admit the allegations in paragraph four, but deny the allegation therein that the Vermejo River is tributary to the North Canadian River, which is, in turn, tributary to the Arkansas River . . . ."

3. The defendants admit the allegation in paragraph five that pursuant to Colorado Revised Statutes 1973, §§ 37-92-101, *et seq.*, "jurisdiction over water matters within the State of Colorado is vested in seven district courts, each having jurisdiction over defined river systems within the state . . . ," as specifically stated in Colorado Revised Statutes 1973, §§ 37-92-201, but deny the jurisdiction of such courts to divest prior appropriations in New Mexico.

4. The defendants admit the allegations in paragraph six that Colorado adheres to the doctrine of prior appropriation, that water rights are initiated by appropriation, and that such rights are confirmed by court decree. Based on information and belief New Mexico avers that no water right to the use of Vermejo River waters in Colorado has ever been initiated by diversion and application to beneficial use. New Mexico further avers that under Colorado law the recognition of a conditional or inchoate water right does not imply that there is unappropriated water available for diversion and application to beneficial use.

5. The defendants admit the allegations in paragraph seven, except that they are without sufficient information to determine whether C. F. & I. Steel Corporation has satisfied all legal prerequisites for the water court's June 20, 1975 award of a conditional water right. On information and belief New Mexico avers that no water right to the use of Vermejo River waters in Colorado has ever been initiated by diversion and application to beneficial use under the June 20, 1975 award or any other Colorado "award" to any other person or entity.

6. The defendants admit the allegation in paragraph eight that the federal district court for the district of New Mexico enjoined in Case No. C1V-76-244-P any out-of-priority use of Vermejo River waters in Colorado, but deny that the State of New Mexico supported the plaintiffs as *amicus curiae.* New Mexico's appearance *amicus curiae* was made to inform the court respecting the discussions between Colorado and New Mexico regarding the Vermejo River.

7. The defendants admit the allegation in paragraph nine that representatives of the State of Colorado and the State of New Mexico discussed Vermejo River waters, but deny New Mexico undertook to discuss the possibility of arriving at agreeable terms and conditions for an interstate compact dividing the waters between the two states. Colorado could not have reasonably expected that New Mexico would have divested its citizens of their property rights to accommodate the development plans of C. F. & I. Steel Corporation.

8. The defendants are without sufficient information to form an opinion as to the truth of the allegations in paragraph ten.

9. The defendants are without sufficient information to form an opinion as to the truth of the allegations in paragraph eleven.

10. The defendants deny the allegation in paragraph twelve that the State of Colorado has a right to judicially secure a share of the waters of an interstate stream when Colorado can assert no actual appropriations to beneficial use that give rise to the equities claimed and when the waters of the stream have been fully appropriated in New Mexico.

11. The defendants deny the allegation in paragraph thirteen that the water flowing in the headwater tributaries of the Vermejo River is "water available in south central Colorado," whether in its natural drainage or by means of C. F. & I. Steel

Corporation's proposed transmountain diversion. The defendants further aver that the economy and welfare of the citizens of the Purgatoire River drainage do not depend upon Vermejo River water because they have never appropriated any of it by application to beneficial use.

12. The defendants deny the allegation in paragraph fourteen that the State of Colorado can now equitably claim a share in the waters of the Vermejo River. The defendants further aver that there never has existed and there does not now exist in Colorado any water right to use Vermejo River water based upon diversion and application to beneficial use. The only "valid water right" in Colorado for the diversion and use of Vermejo River waters is not predicated upon actual appropriation to beneficial use, but upon C. F. & I. Steel Corporation's acquisition on June 20, 1975, of an inchoate right to make an appropriation in the future.

AFFIRMATIVE DEFENSES

1. The State of Colorado makes no beneficial uses from the Vermejo River and therefore has no right in equity to Vermejo River water.

2. The State of Colorado's action is barred by laches. An action for equitable apportionment of the Vermejo River no longer lies because the waters of the river were fully appropriated in New Mexico before any appropriation was undertaken in Colorado.

3. As a matter of law and equity the waters of the Vermejo River are *de facto* equitably apportioned.

4. C. F. & I. Steel Corporation's proposed future diversion and application to beneficial use of Vermejo River waters in Colorado cannot form the basis of an apportionment to Colorado of those waters.

WHEREFORE, having fully answered and having asserted their affirmative defenses, defendants pray that the Court deny the plaintiff's claim for equitable apportionment and dismiss this action for want of equity or decree that the waters of the Vermejo River are in fact equitably apportioned.

Respectfully submitted,

JEFF BINGAMAN,
Attorney General of New Mexico

RICHARD A. SIMMS,
Special Assistant Attorney General

JAY F. STEIN,
Special Assistant Attorney General

G. EMLEN HALL,
Special Assistant Attorney General

Water Resources Division
Bataan Memorial Building
Santa Fe, New Mexico 87503

IN THE

Supreme Court of the United States

October Term, 1977

No. 80, Original

STATE OF COLORADO, *Plaintiff*
v.
STATE OF NEW MEXICO,
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE OF
NEW MEXICO, *Defendants*

MOTION TO REFER TO A SPECIAL MASTER

COMES NOW the defendant, State of New Mexico, on the ground that the composition and responsibilities of the Court are not conducive to the conduct of trial, and moves the Court to refer this action to a Special Master to hear the evidence and report his findings, conclusions, and recommendations as provided by Rule 53 of the Federal Rules of Civil Procedure.

RICHARD A. SIMMS
Special Assistant Attorney General

ATTORNEY FOR THE STATE OF NEW MEXICO

CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify, pursuant to Rule 33(3) of the Rules of the Supreme Court of the United States, that on the 22nd of January, 1979, I served the requisite number of copies of the foregoing Answer and Motion to Refer to a Special Master, by first class mail, on the Governor and the Attorney General of the State of Colorado.

RICHARD A. SIMMS
Special Assistant Attorney General

Water Resources Division
Bataan Memorial Building
Santa Fe, New Mexico 87503

Supreme Court, U.S.
FILED
OCT 20 1980
MICHAEL RODAK, JR., CLERK

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STATE OF COLORADO, *Plaintiff*

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AMENDED ANSWER

JEFF BINGAMAN,
Attorney General of New Mexico

RICHARD A. SIMMS,
Special Assistant Attorney General

JAY F. STEIN,
Special Assistant Attorney General

Water Resources Division
Bataan Memorial Building
Santa Fe, New Mexico 87503

October 16, 1980

VERGARA PRINTING CO. • SANTA FE, NEW MEXICO

IN THE

Supreme Court of the United States

October Term, 1980

No. 80, Original

STATE OF COLORADO, *Plaintiff*

v.

STATE OF NEW MEXICO,
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE OF
NEW MEXICO, *Defendants*

AMENDED ANSWER

The defendants, the State of New Mexico and Jeff Bingaman, successor to Toney Anaya, Attorney General of the State of New Mexico, pursuant to the Special Master's Order on Pretrial Conference of September 18, 1980, amend their Answer of January 22, 1979, and in answer to the State of Colorado's Complaint, state:

1. The allegations in paragraphs one through three are admitted.

2. The defendants admit the allegations in paragraph four, but deny the allegation therein that "the Vermejo River is tributary to the North Canadian River which is, in turn, tributary to the Arkansas River...."

3. The defendants admit the allegation in paragraph five that pursuant to Colorado Revised Statutes 1973, §§ 37-92-101, *et seq.*, "jurisdiction over water matters within the State of Colorado is vested in seven district courts, each having jurisdiction over defined river systems within the state. . . ," as specifically stated in Colorado Revised Statutes 1973, §§ 37-92-201, but deny the jurisdiction of such courts to divest prior appropriations in New Mexico.

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5. The defendants admit the allegations in paragraph seven, except that they are without sufficient information to determine whether C. F. & I. Steel Corporation has satisfied all legal prerequisites for the water court's June 20, 1975 award of a conditional water right. On information and belief New Mexico avers that no water right to the use of Vermejo River waters in Colorado has ever been initiated by diversion and application to beneficial use under the June 20, 1975 award or any other Colorado "award" to any other person or entity.

6. The defendants admit the allegation in paragraph eight that the federal district court for the district of New Mexico enjoined in Case No. CIV-76-244-P any out-of-priority use of Vermejo River waters in Colorado, but deny that the State of New Mexico supported the plaintiffs as *amicus curiae.* New Mexico's appearance *amicus curiae* was made to inform the court respecting the discussions between Colorado and New Mexico regarding the Vermejo River.

7. The defendants admit the allegation in paragraph nine that representatives of the State of Colorado and the State of New Mexico discussed Vermejo River waters, but deny New Mexico undertook to discuss the possibility of arriving at agreeable terms and conditions for an interstate compact dividing the waters between the two states. Colorado could not have reasonably expected that New Mexico would have divested its citizens of their property rights to accommodate the development plans of C. F. & I. Steel Corporation.

8. The defendants are without sufficient information to form an opinion as to the truth of the allegations in paragraph ten.

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Corporation's proposed transmountain diversion. The defendants further aver that the economy and welfare of the citizens of the Purgatoire River drainage do not depend upon Vermejo River water because they have never appropriated any of it by application to beneficial use.

12. The defendants deny the allegation in paragraph fourteen that the State of Colorado can now equitably claim a share in the waters of the Vermejo River. The defendants further aver that there never has existed and there does not now exist in Colorado any water right to use Vermejo River water based upon diversion and application to beneficial use. The only "valid water right" in Colorado for the diversion and use of Vermejo River waters is not predicated upon actual appropriation to beneficial use, but upon C. F. & I. Steel Corporation's acquisition on June 20, 1975, of an inchoate right to make an appropriation in the future.

AFFIRMATIVE DEFENSES

1. The State of Colorado makes no beneficial uses from the Vermejo River and therefore has no right in equity to Vermejo River water.

2. The State of Colorado's action is barred by laches. An action for equitable apportionment of the Vermejo River no longer lies because the waters of the river were fully appropriated in New Mexico before any appropriation was undertaken in Colorado.

3. As a matter of law and equity the waters of the Vermejo River are *de facto* equitably apportioned.

4. C. F. & I. Steel Corporation's proposed future diversion and application to beneficial use of Vermejo River waters in Colorado cannot form the basis of an apportionment to Colorado of those waters.

5. The doctrine of prior appropriation governs the equitable apportionment of Vermejo River waters.

WHEREFORE, having fully answered and having asserted their affirmative defenses, defendants pray that the Court deny the plaintiff's claim for equitable apportionment and dismiss this action for want of equity or decree that the waters of the Vermejo River are in fact equitably apportioned. Alternatively, defendants pray that the waters of the Vermejo River be equitably apportioned in accordance with the doctrine of prior appropriation.

Respectfully submitted,

JEFF BINGAMAN,
Attorney General of New Mexico

Richard A. Simms
By
Jay F. Stein

RICHARD A. SIMMS,
Special Assistant Attorney General

JAY F. STEIN
Special Assistant Attorney General

Water Resources Division
Bataan Memorial Building
Santa Fe, New Mexico 87503

CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify, pursuant to Rule 33(3) of the Rules of the Supreme Court of the United States, that on the 16th of October, 1980, I served the requisite number of copies of the foregoing Amended Answer, by first class mail, on the Governor and the Attorney General of the State of Colorado.

Richard A. Simms
By
Jay F. Stein

RICHARD A. SIMMS
Special Assistant Attorney General

Water Resources Division
Bataan Memorial Building
Santa Fe, New Mexico 87503

Office - Supreme Court, U.S.
FILED
JAN 9 1982
ALEXANDER L. STEVAS,
CLERK

No. 80, Original

IN THE

Supreme Court of the United States

October Term, 1977

STATE OF COLORADO, *Plaintiff*

v.

STATE OF NEW MEXICO
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE OF
NEW MEXICO, *Defendants*

REPORT OF SPECIAL MASTER ON THE EQUITABLE APPORTIONMENT OF THE VERMEJO RIVER

EWING T. KERR
Special Master

United States Federal Building
P.O. Box 888
Cheyenne, Wyoming 82001

December 31, 1981

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REPORT OF SPECIAL MASTER ON THE EQUITABLE APPORTIONMENT OF THE VERMEJO RIVER

I

Narrative Statement of the Evidence

In this action, the State of Colorado is seeking an equitable apportionment of the waters of the Vermejo River. New Mexico resists the diversion by the State of Colorado of any of the waters of this interstate river.

The Vermejo River is a non-navigable, interstate river which originates on the eastern slopes of the Sangre de Cristo Mountains in southern Colorado, just above the Colorado-New Mexico border. The area surrounding the origin of the river is

mountainous, uninhabited and inaccessible for a large part of the year. Ricardo Creek, Little Vermejo Creek and the North Fork of the Vermejo are the three main tributaries which combine to form the Vermejo River about one mile south of the Colorado-New Mexico border. Fish Creek joins Little Vermejo Creek in Colorado above the state line. Additional water is acquired from other small tributaries in New Mexico.

The Vermejo flows southeasterly from Colorado into New Mexico through rolling plains and plateau until it joins the Canadian River approximately four miles southwest of Maxwell, New Mexico.

The Colorado portion of the Vermejo drainage consists of approximately 25-30 square miles of land. Most of the drainage area is above 8500 feet. Snowmelt is the main source of water for the river, although some accretion to the stream-flow comes from summer rains and thunderstorms.

The Vermejo is virtually a closed system. Most of the water is consumed by various users and little, if any, of the water of the Vermejo reaches the Canadian River.

One of the major difficulties confronting the Special Master in this case is the lack of reliable streamflow measurements. There is only one active stream gauging station on the Vermejo which is operated by the U.S. Geological Survey. The gauge is located 1-½ miles above Dawson, New Mexico. It operated intermittently between 1916 and 1928 and regularly from 1928 to the present. The average annual flow for the entire recorded period according to the USGS records is 12,919 acre feet. After compiling the streamflow data recorded at the Dawson Gauge, both Colorado and New Mexico computed and used statistical averages in their exhibits and analysis. Colorado computed and used the figure of 11,035 acre feet as the average flow at the gauge, while New Mexico's computations resulted in a figure of 9,800 acre feet. The discrepancy and disagreement between the

two States occurred because different yearly time periods were used. Colorado used the years 1955-1979 and New Mexico used 1950-1978.

In addition to the Dawson Gauge records, one other set of fragmentary, incomplete measurements was available for consideration by the Special Master. In 1977, C. F. & I. Steel Corporation installed measuring devices on Ricardo Creek at two different points, at the proposed point of diversion and at the state line. A measuring device was also installed on Little Vermejo Creek at the state line. Actual measurements were taken during the years 1977-1980, inclusive. Unfortunately, the accuracy of the measurements is questionable. The evidence shows that the measuring gauges did not always measure the entire flow of the river because the water occasionally flowed around the gauges. At least one of the gauges was completely washed out. The gauges were not calibrated by the USGS, nor were the records reviewed by that same organization or by the State of Colorado. However, due to the nature and cause of the inaccuracy, the measurements provided by the devices are probably on the low side. According to the measurements which were actually taken between 1977 and 1980, 6900 acre feet were produced by Ricardo Creek and 1500 acre feet were produced by Little Vermejo Creek, for a total of 8400 acre feet. No measuring gauges were placed on the North Fork of the Vermejo, so the contribution of that tributary plus the inaccuracy of the measuring gauges just mentioned would appear to compel the conclusion that the estimate of 8400 acre feet for the Colorado production is somewhat low.

New Mexico used an altitude-runoff relationship in lieu of actual measurements to calculate the amount of water produced in Colorado. The figure derived from this statistical analysis was 5500 acre feet, some 2900 acre feet less than Colorado's estimate.

Although the actual measurements taken by C. F. & I. Steel Corporation are somewhat low, it would appear that the actual measurements are a more reliable indicator of the water produced in Colorado than the New Mexico altitude-runoff statistical analysis which is based upon rainfall in other areas and the subsequent calculation of probabilities.

At the present time, there are no appropriators of Vermejo water in Colorado. C. F. & I. Steel Corporation owns an inchoate water right entitling it to a diversion of 75 cubic feet per second. Of the 75 cubic feet per second allocated to C. F. & I. Steel Corporation, 45 cubic feet per second are to be diverted from Ricardo Creek, 25 cubic feet per second from Little Vermejo Creek and 5 cubic feet per second from Fish Creek.

There are four major appropriators of Vermejo waters in New Mexico. Above the Dawson Gauge, the Vermejo Park Corporation and Kaiser Steel Corporation divert Vermejo water. Below the Dawson Gauge, the Phelps Dodge Corporation and the Vermejo Conservancy District divert the remaining water. There are a few minor appropriators who also divert some water, but the four organizations just mentioned divert the major portion of the water. As noted earlier, very little, if any, water escapes from the diversion works of the Vermejo Conservancy District. The effect of a diversion in Colorado on those who live below the Vermejo Conservancy District would be negligible and virtually non-existent. There was no competent evidence of any dependency on Vermejo water by users downstream from the Vermejo Conservancy District and no calls have ever been made for the water by the downstream users.

After the Vermejo River leaves Colorado, the first diversion of water is taken by the Vermejo Park Corporation. Vermejo Park Corporation is a wholly owned subsidiary of Pennzoil Corporation. The property owned by Pennzoil through

Vermejo Park Corporation is used primarily for hunting, fishing and recreational activities. Pennzoil also operates a cattle operation on the property. The main crop grown on the land is hay for the cattle. Both States disagree on the number of acres irrigated by the corporation. Colorado maintains that only 250 acres, requiring approximately 500 acre feet of water, are irrigated. New Mexico, on the other hand, states that the acreage irrigated is limited only by the lack of water.

Vermejo Park Corporation, like the other corporations appropriating water on the Vermejo, purchased its water rights from the early settlers and their subsequent purchasers in the area. The priority dates for the Vermejo Park Corporation are 1873, 1876 and 1878 on the main stem of the Vermejo, 1876 and 1907 for the tributaries, and 1907 for six lakes owned by the corporation. The corporation has 10,000 acre feet of storage rights in the lakes. Pursuant to the decree, Vermejo Park Corporation can take water for its lakes only during a flood. The lakes are used mainly for fishing rather than irrigation because most of the hay production is on the Cimarron rather than the Vermejo.

In the middle of the property owned by Vermejo Park Corporation, Kaiser Steel Company makes its diversions for its York Canyon coal mine. As of May, 1980, Kaiser Steel had decreed rights of 630 acre feet. Of the 630 acre feet decreed to Kaiser Steel, 230 acre feet were acquired from an individual named Messick in perpetuity. An additional 430 acre feet are leased from Phelps Dodge Corporation for a total of 630 acre feet. Kaiser Steel diverts an average of 251.28 acre feet per year out of its decreed 630 acre feet per year. Kaiser has never diverted its full decreed appropriation, although the flow measurements at the downstream Dawson Gauge would indicate that more than enough water is available to satisfy the full appropriations of both corporations. This would appear to be true regardless of which State's figures are used.

Kaiser Steel has priority over Vermejo Park Corporation with all of its leased rights from Phelps Dodge and with part of its purchased rights from individuals. The lease under which Kaiser Steel has acquired some of its water from Phelps Dodge is a 10 year lease with two 10 year extension options. Currently the lease is at the end of the 10 year period and another 10 year extension has been applied for in accordance with the lease. Phelps Dodge has the option to give a three year notice of termination but as of the time of hearing, no such notice of termination had been given by Phelps Dodge to Kaiser Steel.

Under the water rights agreement between Kaiser Steel and Messick, Kaiser Steel is required to return 25% of its diversions under the Messick rights. There was some evidence which indicated that the actual return flow was somewhere around 33% rather than the required 25%.

Kaiser Steel maintains two diversion points for its coal mine. One diversion point is located directly on the Vermejo, while the second is on York Canyon Creek. The York Canyon coal mine uses the water for coal dusting, environmental reclamation and maintenance for the 500 employees working in the mine.

Kaiser Steel has purchased 2000 acre feet of water rights from the Cimarron River for use in the York Canyon mine in the future should such water be necessary. The possibility also exists that Kaiser Steel could purchase other water rights in addition to those it has just acquired on the Cimarron River.

The first diversion of water after the Dawson Gauge is taken by the Phelps Dodge Company. Phelps Dodge has the earliest priority date on the river. Its water rights were also purchased by the corporation from individual water rights holders. Phelps Dodge currently owns 694 acre feet of water rights. Of these 694 acre feet, Phelps Dodge has leased 400 acre feet to Kaiser Steel. The remaining 294 acre feet are used by the C. S.

Springer Cattle Company. Phelps Dodge has leased the land and water rights to the cattle company. Under the decree, Phelps Dodge has the right to irrigate 501.19 acres of land. Of the 501.19 acres, 200 have been leased to Kaiser Steel. Only 150 acres of the remaining 300.19 are irrigated by the cattle company.

Beneath the Phelps Dodge diversion, water is available for stock ponds. These ponds are small and usually contain less than 10 acre feet per pond. Such ponds are not administered or limited in number in New Mexico. The number of stock ponds is significant and accounts for a substantial depletion of the Vermejo's flow.

A final diversion of the waters of the Vermejo is taken by the Vermejo Conservancy District. The District is comprised of 60-65 farms. The diversion structure of the District is capable of diverting 600 cubic feet per second. Water is delivered through a 70 mile system of canals and laterals.

The Vermejo Conservancy District is the largest user of Vermejo water in New Mexico. The Vermejo is not, however, the only source of water for the District. Approximately ⅓ of the District's water supply comes from the Chico-Rico system which also originates in Colorado.

In the early 1950's, the District was part of a large reclamation project. Although doubt about the effectiveness of the project was expressed from the start, the project was still completed. The projected impact and effect of the project have never been realized. The passage of time has confirmed the fact that the project should never have been built. The District has not made any payments for the project for many years. Unfortunately, the project is a failure in spite of the tremendous outpouring of money, effort and time. At no time in the history of the project has the full amount of acreage to be irrigated under the project been irrigated.

The system of canals used to transport the water to the fields is inefficient, resulting in a water loss which can run as high as 33%.

Initially, grains were the main crop in the District, but now the farms support mainly oats and alfalfa.

Most of the farmers in the area are employed in other jobs in addition to maintaining their farms. The jobs held by these farmers are mainly full-time jobs, although some do hold part-time jobs.

II

EQUITABLE APPORTIONMENT

Apportionment of an interstate river is a question which has come before the Supreme Court on numerous occasions. Each case is unique with its own set of facts to be considered. The Court has held before that it will not exercise jurisdiction over a suit between two States unless the invasion of rights is one of a "serious magnitude." Hinderlider v. La Plata Co., 304 U.S. 92 (1938). The question of an apportionment of the Vermejo River is one of serious magnitude to both Colorado and New Mexico and is within the Court's original jurisdiction.

When resolving controversies between two States regarding an interstate river, the Court has applied the doctrine of equitable apportionment. Simply stated, the doctrine says that each State is equal to all of the others, and as quasi-sovereigns, each State is entitled to a share of a river flowing between them. Each is entitled to benefit from the interstate river flowing within its borders.

A review of the cases adopting the doctrine is helpful in analyzing the dispute between Colorado and New Mexico.

KANSAS v. COLORADO, 206 U.S. 46 (1907)

The case which first established the doctrine of equitable apportionment is Kansas v. Colorado. In that case, the State of Kansas was suing the State of Colorado, seeking a prohibition against the use of Arkansas River waters by Colorado. It was the contention of Kansas that it was entitled to the full, natural flow of the river by virtue of prior appropriation. Kansas also alleged injury to the State and its inhabitants. The Court rejected that contention, saying that if the premise espoused by Kansas were correct, then Kansas itself would not be entitled to divert much water for irrigation because it would be required to send the natural flow of the river on to the next downstream state.

In further denying the position urged by Kansas, the Court considered other factors which are pertinent to the case now pending before the Special Master.

Both the Vermejo and the Arkansas Rivers have varying flows dependent upon the time of the year. Due to their origin high in the mountains, snow melt is the main source of water for both rivers. Thus, as the Court has noted:

> . . . [T]hat there is a great variance in the amount of water flowing down the channel at different seasons of the year and in different years is undoubted; that at times the entire bed of the channel has been in places dry is evident from the testimony. In that way it may be called a broken river. But this is a fact common to all streams having their origin in a mountainous region, and whose volume is largely affected by the melting of the mountain snows.

New Mexico claims injury to established economic interests

in the same manner that Kansas claimed such an injury. Even though the Court acknowledged that some injury would accrue to Kansas, it still looked at the valley as a whole and noted minimal injury to the valley when viewed in that manner. The same type of situation exists in this case. Of the four major diverters of Vermejo water in New Mexico, the Vermejo Conservancy District would be the one most affected by a diversion in Colorado. The other three major users, Vermejo Park Corporation (Pennzoil), Kaiser Steel and Phelps Dodge would be minimally affected, if at all. As the Court stated in Kansas v. Colorado:

> . . . [W]hile the influence of such diminution has been of perceptible injury to portions of the Arkansas Valley in Kansas, particularly those portions closest to the Colorado line, yet to the great body of the valley it has worked little, if any, detriment, and regarding the interests of both states and the right of each to receive benefit through irrigation and in any other manner from the waters of the stream, we are not satisfied that Kansas has made out a case entitling it to a decree.

It should be noted that the facts of this case establish that the Vermejo Conservancy District does not have an economically feasible operation. There is no competent evidence which would indicate that the District will ever be able to meet its debts and live up to its expectations, and for this reason, the impact of a Colorado diversion on New Mexico users, as a whole, would be minimal.

WYOMING v. COLORADO, 259 U.S. 419 (1922)

The second case in which the Court discussed equitable apportionment was Wyoming v. Colorado. The controversy arose when Wyoming sued Colorado to prevent a proposed diversion by Colorado of the waters of the Laramie River, an interstate

river flowing between the two States. The diversion in question in the case was a proposed transmountain diversion by two Colorado corporations. Similarities and differences exist between this case and the current matter before the Special Master.

In Wyoming v. Colorado the Court further explained its opinion in Kansas v. Colorado. The Court noted that the case was a "pioneer in its field." It held that the Court had jurisdiction over "a controversy between two States over the diversion and use of waters of a stream passing from one to the other."

A distinction was made in Wyoming v. Colorado by noting that in Kansas v. Colorado the controversy was between two States with different water policies. Kansas is a riparian State, whereas Colorado has adopted a policy that is in effect in most of the arid west—that of appropriation. Additionally, in the earlier case there was a return flow and the diversion in question was not a future use, but rather had been "practiced for years."

In analyzing the current case between Colorado and New Mexico, the Special Master finds that Kansas v. Colorado is important for two basic principles: First, that the Court has jurisdiction over a case such as this, and secondly, that the doctrine of equitable apportionment was established.

A close reading of Wyoming v. Colorado shows that a similarity exists between that case and the one now before the Master. In both cases, the States involved are in the arid west and both recognize appropriation as their controlling doctrine for water law. Snow melt is the major source of the water proposed to be diverted from non-navigable streams. Proposed, future, corporate diversions are involved in both cases. No return flow can be expected because the water would be transferred by transmountain diversion structures to another watershed.

The arguments of New Mexico in Colorado v. New Mexico

are the same as those given by Wyoming in Wyoming v. Colorado, and are simply stated: If the diversion is allowed, a sufficient amount of water will not be left in the stream to satisfy rights in New Mexico which are prior in time, and thus superior, to those in Colorado. Colorado in turn argues that she is not asking for all of the water which she produces, and that the diversion which she is seeking will leave a sufficient quantity of water in the stream to satisfy existing rights.

The Master notes that in the Wyoming v. Colorado case the Court held that the fact that a diversion is to another watershed is not a reason to decide this case in favor of New Mexico. The principle of appropriation does not require that the diversion and use of the water be in the same watershed where the river is located.

Another factor which the two cases have in common is the lack of concise, complete measurement data. In Wyoming v. Colorado, the Court rejected the use of averages and yearly flows as the means to establish dependable supply. The Court also recognized that the lowest natural flow of the years is not a realistic indicator of the dependable supply. The Court suggested at that time that reservoirs and other conservation measures were appropriate:

> . . . [T]he question here is not what one State should do for the other, but how each should exercise her relative rights in the waters of this interstate stream. Both are interested in the stream and both have great need for the water. Both subscribe to the doctrine of appropriation, and by that doctrine rights to water are measured by what is reasonably required and applied. Both States recognize that conservation within practicable limits is essential in order that needless waste may be prevented and the largest feasible use may be secured. This comports with the all-pervading spirit of the doctrine of appropriation and takes appropriate heed of the natural necessities out of which it arose. We think that

> doctrine lays on each of these States a duty to exercise her right reasonably and in a manner calculated to conserve the common supply.

After analyzing the data provided and the conservation measures applied by the States in Wyoming v. Colorado, the Court concluded that the doctrine of appropriation should be applied. It held that sufficient water was present to satisfy senior Wyoming and Colorado appropriators and still leave 15,500 acre-feet of water per annum for the Laramie-Poudre Tunnel appropriation.

The Court did not apply strict priority in the sense that the project was to receive 15,500 acre feet per annum regardless of the natural flow of the river in any given year.

Although the Wyoming v. Colorado case was more applicable to Colorado v. New Mexico than was Kansas v. Colorado, the case was certainly not the Court's last pronouncement on the subject.

CONNECTICUT v. MASSACHUSETTS, 282 U.S. 660 (1930)

In this case, the State of Connecticut was seeking to enjoin the State of Massachusetts from diverting waters from the Connecticut River for Boston and some other neighboring cities and towns. The diversion in question involved a proposed use and not one already in existence.

In looking at the facts of the case, the Court analyzed Kansas v. Colorado and Wyoming v. Colorado. It reaffirmed its earlier position that the laws of the individual States involved are not necessarily controlling. Instead the Court spoke of an "interstate common law." Part of this interstate common law is the doctrine of equitable apportionment. In further defining this doctrine, the Court stated:

> . . . [F]or the decision of suits between States, federal, state and international law are considered and applied by this Court as the exigencies of the particular case may require. The determination of the relative rights of contending States in respect of the use of streams flowing through them does not depend upon the same considerations and is not governed by the same rules of law that are applied in such States for the solution of similar questions of private right. Kansas v. Colorado, 185 U.S. 125, 146. And, while the municipal law relating to like questions between individuals is to be taken into account, it is not to be deemed to have controlling weight. As was shown in Kansas v. Colorado, 206 U.S. 46, 100, such disputes are to be settled on the basis of equality of right. But this is not to say that there must be an equal division of the waters of an interstate stream among the States through which it flows. It means that the principles of right and equity shall be applied having regard to the "equal level or plane on which all the States stand, in point of power and right, under our constitutional system" and that, upon a consideration of the pertinent laws of the contending States and all other relevant facts, this Court will determine what is an equitable apportionment of the use of such waters. Wyoming v. Colorado, 259 U.S. 419, 465, 470.

The equities of these cases require that the Master consider many factors, not just the law of the States involved. Thus, although appropriation is an important factor to be considered, the Master must also consider other factors such as whether or not there is "real or substantial injury or damage."

The Court held that Massachusetts was entitled to some of the water from the river, although it also made it quite clear that the amount of water which could be diverted by Massachusetts from the river was not unlimited. The fact that the water was for a future use and of a later priority than some of the uses in Connecticut did not deter the Court from awarding some of the water to Massachusetts.

NEW JERSEY v. NEW YORK, 283 U.S. 336 (1931)

Here, the Court again reaffirmed the principle of equitable apportionment in interstate river cases. New Jersey was praying for an injunction against diversions from the Delaware River and its tributaries for a future water supply for the City of New York.

The Court noted that New York had the power to restrain all of the water within its jurisdiction, but that such action would be unacceptable. It held that the lower State could not reasonably expect the upper State to send the undiminished flow of the river downstream. Both States "have real and substantial interests" in the waters of an interstate river.

The Court also reaffirmed the principle that the removal of water to a different watershed was not a reason to deny water to New York.

After analyzing the evidence in the New Jersey case, the Master concluded that the diversion would not materially affect the use of the river for industry and agriculture and the Court affirmed this position.

WASHINGTON v. OREGON, 297 U.S. 517 (1936)

At first reading it would appear that the case of Washington v. Oregon answers the questions raised by Colorado v. New Mexico. Unfortunately, simplicity is never the rule in cases between two States, and the current matter is no exception. Although the Washington v. Oregon case is somewhat helpful, it is distinguishable, particularly in light of subsequent cases bearing on the same subject.

The State of Washington filed a complaint charging that the State of Oregon was wrongfully diverting the waters of the

Walla Walla River. The Walla Walla is a non-navigable river which arises in the Blue Mountains of northeastern Oregon. The river splits into two branches at the Red Bridge in Oregon. One of the branches is the Tum-a-lum, while the other is the Little Walla Walla. The Tum-a-lum was the river the Court was concerned with in the case. Both States are semi-arid in that area and the waters of the river come mainly from snow melt. Appropriation is recognized by both States.

During periods of low flow, Oregon had been diverting, without interruption, the waters of the Tum-a-lum. After considerable discussion about priorities and damages alleged to have been sustained, the Court concluded that no real reason existed to require Oregon to turn the water past the Red Bridge in a vain attempt to have the water reach Washington. The nature of the channel of the Tum-a-lum was such that the water would sink into the ground and would never reach Washington. It made no sense to sacrifice some of the existing benefits in Oregon for a complete lack of corresponding benefits in Washington. In an attempt to show damage, Washington alleged that its Garden Farms District was suffering damage due to the diversion of the water by Oregon. As the Court pointed out, however, the District started its project with knowledge of the Oregon appropriations. During periods of shortage there would be no water available at the canals of the District if the Court had ordered Oregon to send some of the water past the Red Bridge. Without any evidence of damage of a serious magnitude or of a corresponding benefit, equity would not have been served if the Court had ordered Oregon to release water down the Tum-a-lum channel during periods of low flow.

In distinguishing the Washington v. Oregon case from Colorado v. New Mexico, the Master notes that each equitable apportionment case is unique with its own set of facts to be considered by the Court. Priority of appropriation is one of the

main factors to be considered, although it is not conclusive. Connecticut v. Massachusetts, and Nebraska v. Wyoming.

There is no dispute that Colorado has never diverted water from the Vermejo. An inchoate water right belonging to C. F. & I. Steel Corporation is the proposed use for any diversion Colorado might receive. If the Master were to apply the doctrine of appropriation as it is applied in these two States, Colorado would not receive any Vermejo water. To so hold would permit one of the factors used in making an equitable apportionment to destroy the guiding principle itself. Carried to this extreme, priority of appropriation would prevent an equitable apportionment from occurring.

The diversion requested by Colorado would take approximately one half of the water produced in that State. Any damages to New Mexico must be weighed against benefits which will accrue to Colorado. C. F. & I. Steel Corporation is a major employer in southern Colorado and northern New Mexico. The proposed use to which C. F. & I. would put the water would have economic repercussions throughout the economy of the area.

HINDERLIDER v. LA PLATA CO., 304 U.S. 92 (1938)

In this case, the State of Colorado challenged an interstate compact negotiated between Colorado and New Mexico with the consent of Congress. The case came before the Court after the Supreme Court of Colorado made the determination that Colorado water rights were vested property rights which could not be taken away by an interstate compact. Although the Supreme Court agreed that water rights are property rights, the Court also stated that water rights are only "indefeasible so far as concerns the State of Colorado, its citizens, and any other person claiming water rights there."

The Court went on to hold that regardless of priority of right Colorado was only entitled to an equitable portion of the interstate river and could only confer water rights to the extent of her equitable share.

Compact negotiations were attempted between Colorado and New Mexico regarding the Vermejo River, but these negotiations were unsuccessful.

Hinderlider is important because it reaffirms the Court's position that the doctrine of equitable apportionment is still the guiding principle, even though senior appropriators in one or both states may be damaged.

COLORADO v. KANSAS, 320 U.S. 383 (1943)

The second case involving the Arkansas River commenced in 1943 when Colorado filed a Complaint against Kansas seeking an injunction against further lawsuits by Kansas users against Colorado users.

This sequel to the pioneer case of Kansas v. Colorado sheds little light on the problems confronting the Master in this matter. The issue in the second case can be easily summarized: Could Kansas establish that she was now seriously damaged by increasing Colorado diversions? The Court again answered this key question in the negative as it had done in the original landmark case of Kansas v. Colorado. In coming to this conclusion the Court considered many factors such as ground water, return flow, and an increase in irrigated acreage in Kansas despite Colorado diversions. None of these factors are relevant to the current action because there is no ground water to speak of, there is no possibility of a return flow as the Colorado diversion would be to another watershed, and there is no evidence in the record

which indicates that the amount of irrigated acreage in New Mexico is increasing.

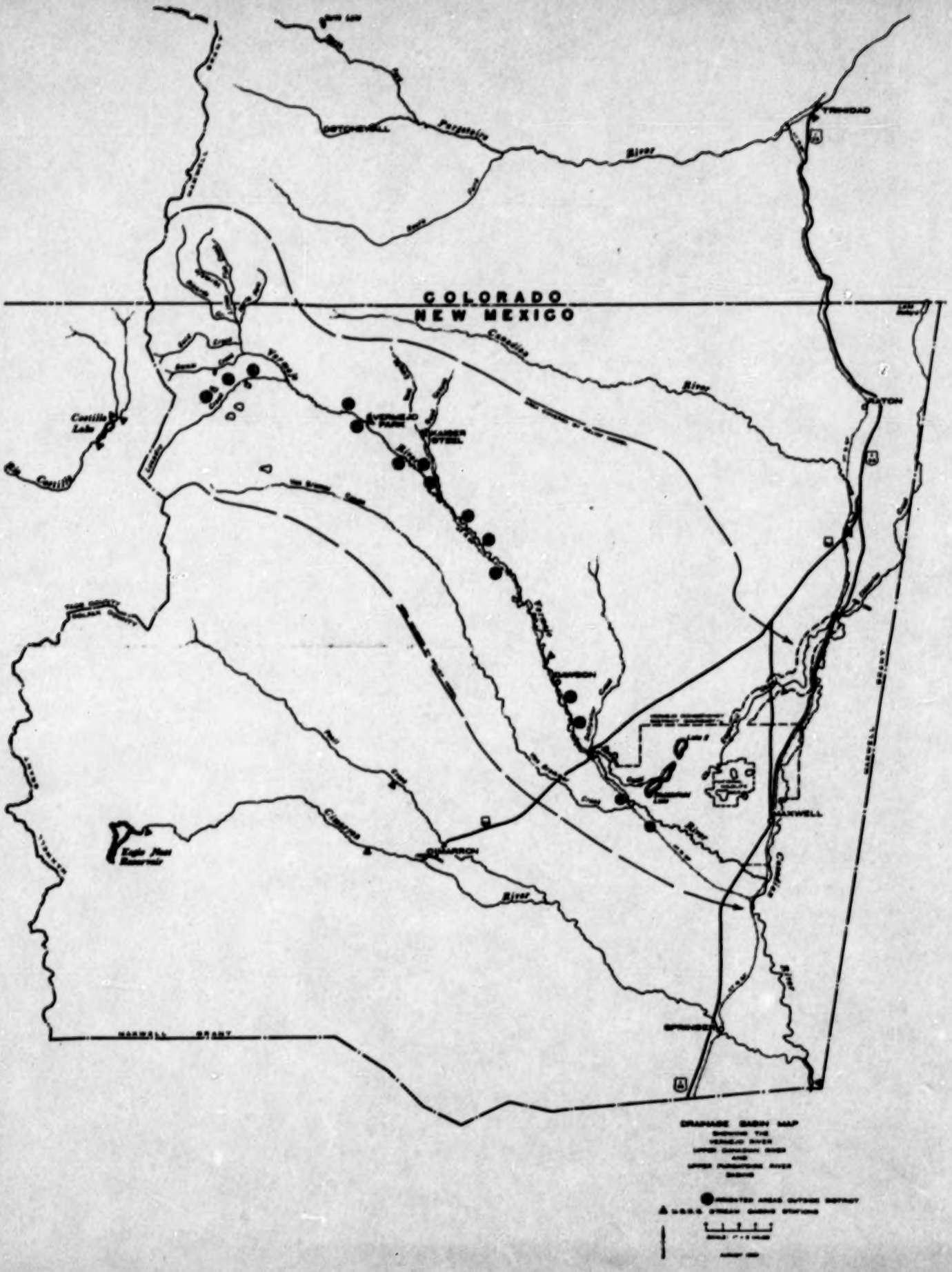
However, two points which were made in Colorado v. Kansas are still relevant in Colorado's suit against New Mexico. The first point highlights a theme common to all of the Court's equitable apportionment cases. Simply stated, the burden of proof on a complaining State "is much greater than that generally required to be borne by private parties."

The second point of major importance to be gleaned from the second adjudication of the Arkansas River is that average annual flow data is often not very helpful in determining the availability of a dependable supply, particularly if the averages include flood waters. Flood waters are generally largely unusable due to the inability of most diversion works to handle them, and also because of the sand and debris which they contain. Both Colorado and New Mexico used average flows in their testimony and exhibits before the Special Master.

NEBRASKA v. WYOMING, 325 U.S. 589 (1945)

In 1934 Nebraska brought suit against Wyoming seeking an equitable apportionment of the waters of the North Platte River. Colorado was impleaded as a defendant in the action and the United States intervened. Nebraska alleged that Wyoming and Colorado were diverting more water than that to which they were entitled, violating both the principles of equitable apportionment and priority of appropriation.

In determining whether or not the controversy came within its original jurisdiction, the Court noted that the case involved a situation in which "the claims to the water of a river exceed the supply." Although analogous to a private suit in which two parties are vying for the same parcel of land, the Court noted that


COLORADO
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RATON
SPRINGER
CIMARRON
RIVER
CANADIAN
RIVER
CANTON
SPRINGS

the two parties involved in the case were States, and thus within the Court's original jurisdiction.

In discussing both equitable apportionment and appropriation, the Court cited again with approval the language adopting these principles in Wyoming v. Colorado. Having approved the basic rules of appropriation as a factor in equitable apportionment, the Court went on to note that a strict application of the rule would not always be equitable and that appropriation was only one of many factors to be considered:

> . . . [S]ince Colorado, Wyoming, and Nebraska are appropriation States, that principle would seem to be equally applicable here.
>
> That does not mean that there must be a literal application of the priority rule. We stated in Colorado v. Kansas, supra, that in determining whether one State is "using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one State or the other must be weighed as of the date when the controversy is mooted." 320 U.S. p. 394. That case did not involve a controversy between two appropriation States. But if an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible. For example, the economy of a region may have been established on the basis of junior appropriations. So far as possible those established uses should be protected though strict application of the priority rule might jeopardize them. Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed

> on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interest which must be made.

If the rule of priority were to be strictly applied in Colorado v. New Mexico, a diversion of water by Colorado could not occur. As the Court has held before, factors other than priority must be applied to achieve equity in cases involving an interstate river.

The unique circumstance which confronts the Master in this case is Colorado's failure to divert water and put it to beneficial use at any time in the past. New Mexico has applied the water and has existing economies which are dependent upon that water. Although these particular facts are unique, a close examination of the principles analyzed and discussed in the Court's prior opinions has been helpful.

Once established, the principle of equitable apportionment has been adhered to by the Court without fail except in one case where the water would never have reached the other state. This overriding principle, combined with the other factors of this case, such as the nature of the existing economies in New Mexico, persuades the Master that there is no reason to depart from the basic principle of equitable apportionment.

ARIZONA v. CALIFORNIA, 373 U.S. 546 (1963)

Emphasis has been placed by counsel on the Court's decision in Arizona v. California. In that case the controversy centered around the water rights of several States in the Colorado River and its tributaries. Counsel's reliance on this case is misplaced. Early in the Court's decision, it noted:

> . . . [W]e agree with the Master that apportionment of the Lower Basin waters of the Colorado River is not controlled by the doctrine of equitable apportionment or by the Colorado River Compact. It is true that the Court has used the doctrine of equitable apportionment to decide river controversies between States. But in those cases Congress had not made any statutory apportionment. In this case, we have decided that Congress has provided its own method for allocating among the Lower Basin States the mainstream water to which they are entitled under the Compact. Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an "equitable apportionment" for the apportionment chosen by Congress . . .

No such statutory pronouncement has come from the Congress regarding the Vermejo River. Equitable apportionment remains the guiding doctrine in this matter, and Arizona v. California provides little insight other than to reaffirm that doctrine.

III

CONCLUSIONS AND RECOMMENDATIONS

A careful review of all of the evidence and the decided cases on equitable apportionment persuades the Master that Colorado should be permitted a transmountain diversion of 4000 acre-feet per calendar year. Said diversion should be from Ricardo Creek, Little Vermejo Creek, and Fish Creek.

In a sense, Colorado has a junior appropriation in the form of an inchoate water right. The Court has often held that senior water rights may be subrogated to junior water rights so that

equity may prevail. In this case, the entire equitable apportionment principle would become meaningless if the Master were to decide that Colorado was not entitled to any Vermejo waters because she had not used any of them in the past.

It is the opinion of the Master that a transmountain diversion would not materially affect the appropriations granted by New Mexico for users downstream. A thorough examination of the existing economies in New Mexico convinces the Master that the injury to New Mexico, if any, will be more than offset by the benefit to Colorado.

The Master is of the opinion that the evidence presented demonstrates that sufficient water is available for Vermejo Park Corporation, Kaiser Steel, and Phelps Dodge. The flows at the Dawson Gauge indicate sufficient water to meet the needs of all three corporations regardless of which State's figures are used.

The Vermejo Conservancy District has never been an economically feasible operation. Payments for the project have not been made for many years and the possibility of future payments being made is remote. Most of the people in the area have income from sources other than farming and ranching.

To deny Colorado a share of that which she produces would appear to the Master to be inequitable. As the Court stated in Nebraska v. Wyoming:

> . . . [P]riority of appropriation, while the guiding principle for an apportionment, is not a hard and fast rule. Colorado's countervailing equities indicate it should not be strictly adhered to in this situation.

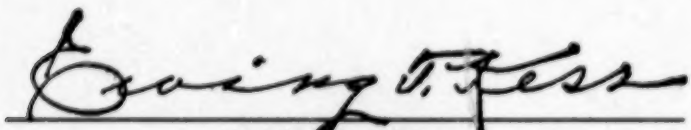
Countervailing equities in favor of Colorado are present in this matter. These equities require that Colorado receive her equitable share of Vermejo River waters.

It is the recommendation of the Master that the diversion

of 4000 acre-feet per annum commence during the season of 1982.

The State of Colorado shall, prior to the diversion of any waters, install a water gauge at each point of diversion and record the amount of diversions and shall make available to the State of New Mexico, when requested, any and all records so obtained.

Dated at Cheyenne, December 31, 1981.



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No. 80, Original

IN THE

Supreme Court of the United States

October Term, 1977

STATE OF COLORADO, *Plaintiff*

v.

STATE OF NEW MEXICO
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE OF
NEW MEXICO, *Defendants*

NEW MEXICO'S EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER AND BRIEF IN SUPPORT THEREOF

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April 7, 1982

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EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

On April 16, 1979, the Court appointed Ewing T. Kerr, Senior Judge for the United States District Court for the District of Wyoming, as its Special Master. Following an extensive presentation of evidence, the Special Master reached his conclusions and made recommendations in his Report of Special Master on the Equitable Apportionment of the Vermejo River, which was accepted for filing on February 22, 1982. The State of New Mexico takes exception to the Special Master's Report in the following respects:

1) The Master's characterization of the law is founded on a manifest misunderstanding of the previous decisions of the

Court in equitable apportionment actions. For example, the Master dismissed *Arizona v. California,* 373 U.S. 546 (1963), as irrelevant because the Boulder Canyon Project Act and not equitable apportionment was determinative of the issues. (Report, p. 22). In fact, the Court observed that the Gila River, a tributary to the Colorado River flowing between New Mexico and Arizona, was "not within the regulatory provisions of the Project Act [and] the Master held that this interstate dispute should be decided under the principles of equitable apportionment." 373 U.S. at 595.

In *Arizona v. California,* New Mexico took exactly the same position as we take here, *viz.,* that priority of appropriation is the guiding principle in apportionment in the West, except that it may be varied to protect economies based upon junior uses of water. The Special Master agreed. *See,* Special Master's Report, *Arizona v. California,* Dec. 5, 1960, pp. 325-327. In both the majority and dissenting opinions, the Court adopted his analysis. 373 U.S. at 595, 607-608, and 629.

2) The Report demonstrates that the Master did not understand or properly analyze much of the technical evidence, causing him to base his recommendations on anomalous findings of fact. For example, the Master based his belief that no injury would occur in New Mexico as a result of an award to Colorado on his finding that a major irrigation district in New Mexico "is inefficient, resulting in a water loss which can run as high as 33%." (Report, p. 8). Stated the other way around, he found an efficiency of 67%.

The Master derived 33% from rounding off the figure of 32.7% appearing on page 8 of Colorado's recommended report. Not understanding Colorado's assertion, albeit mistaken, that "(t)he efficiency of the District system is 32.7 percent to the farm headgate," the Master inverted the significance of the number.Instead of finding that the District has a low efficiency of

33%, the Master found that it has an unrealistically ideal efficiency of 67%. Notwithstanding many hours of testimony on irrigation efficiency, the Master's understanding is conceptually backwards. In sum, the Master believed he had made a finding which justified his conclusion that the District would not be injured. On the contrary, he made a finding which contradicts his conclusion. As is discussed in our supporting brief, the Master's evaluation of much of the evidence is similarly flawed.

3) Based upon demonstrably erroneous legal conclusions and a disregard for critical elements of evidence, the Master's Report does not evaluate the facts essential to an understanding of this action as a matter of law, thus making it impossible for the Court to adopt, reject, or modify the Report without an independent review of the record. For example, the Master ignored 41,000 acres of irrigated lands with rights in Vermejo waters below its confluence with the Canadian River primarily on the theory that downstream users were obligated under the law of prior appropriation to make calls upon the Vermejo users in order to preserve their rights. (Report, p. 4). There is no basis in law, however, for downstream, junior users to make such calls upon senior users. N.M. Const. art. XVI, § 3. Furthermore, the Master inexplicably adopted as the amount of "historic use" of Vermejo waters in New Mexico the comparatively limited uses resulting from drought in the 1970s. While the record presents the historic use, the Master does not discuss it, thus making it impossible to ascertain the equities arising from the actual historic use. Similarly, the Master's belief that an irrigation district in New Mexico is "economically unfeasible" and should therefore be sacrificed to C.F. & I.'s proposed diversion in Colorado is based upon severe drought conditions instead of conditions of adequate supply.

4) The ultimate findings and conclusions in the Master's Report are internally inconsistent and contradictory. Following

a line of reasoning that has been expressly rejected by the Court, the Master concludes that no injury would result to New Mexico if C.F. & I. were awarded essentially all of the dependable flow of the river. Anomalously, the Master then concludes that priority of appropriation should not govern uses of Vermejo water interstate. If there were no injury there would be absolutely no reason not to apply priority of appropriation, as the Court has held in *Wyoming v. Colorado*, 259 U.S. 419 (1922), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and *Arizona v. California, supra.*

5) The Master did not expressly rule on the propriety of Colorado having abandoned its own interests in the Vermejo River to bring this action solely on behalf of Colorado Fuel and Iron Steel Corporation.

6) The Special Master has ignored the Court's reasoning in all previous equitable apportionment actions and reached the empty conclusion that the nature of the action, i.e., apportionment, compels a division of water. The Master was of the opinion that "each State is entitled to a share of a river flowing between them." (Report, p. 8). This preconceived notion that the plaintiff state should prevail in an equitable apportionment action biased the Special Master before trial began. When combined with the Master's failure to articulate the facts essential to the resolution of this case, the Master's conclusions of law render his Report wholly lacking in substance and merit.

WHEREFORE, the State of New Mexico prays that the Court reject the Master's Report, make an independent review of the record, and decide this case in accordance with the

evidence and principles of equitable apportionment as reasoned and defined in the Court's earlier decisions.

Respectfully submitted,

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BRIEF IN SUPPORT OF EXCEPTIONS TO THE REPORT OF SPECIAL MASTER

QUESTIONS PRESENTED

1. Should the principle of priority of appropriation be varied in an equitable apportionment of the Vermejo River to provide for future developments in Colorado at the expense of an existing economy in New Mexico?

2. Can Colorado obtain a decree in this action solely for the benefit of one of its citizens under the Eleventh Amendment to the Constitution?

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STATEMENT OF JURISDICTION

The original jurisdiction of the Court was invoked by . 'o-rado under Article III, Section 2, Clause 2 of the Constitution of the United States.

STATEMENT OF THE CASE

This is an original action in which the State of Colorado seeks an "equitable apportionment" of the Vermejo River, an interstate stream flowing between southern Colorado and northern New Mexico. New Mexico disputes Colorado's right to effect an apportionment of Vermejo water without regard to the guiding principle of prior appropriation. The Court granted Colorado leave to file complaint on November 27, 1978. On April 16, 1979, the Court appointed Ewing T. Kerr, the Senior Judge for the United States District Court for the District of Wyoming, as its Special Master to take evidence and to report to the Court. Trial was conducted over a period of three weeks. The Master's Report was filed on February 22, 1982. Pursuant to the Court's Order of the same day the parties were granted 45 days to file exceptions with supporting briefs. On March 22, 1982, Colorado waived the right to file exceptions.

SUMMARY OF ARGUMENT

I

Equitable apportionment is a cause of action designed to address the situation in which intrastate appropriations of water have resulted in the simultaneous development of conflicting economies in two or more states. *Kansas v. Colorado*, 206 U.S. 46 (1907). As between states in the arid West which have adopted the doctrine of prior appropriation, the federal common law utilized in equitable apportionment suits derives from an application of common principles without regard to political boundaries. *Wyoming v. Colorado*, 259 U.S. 419 (1922).

Priority of appropriation is a fair and equitable doctrine embodied in the statutes and constitutions of nearly all of the western states. *E.g.*, Colo. Const. art. XVI, §6; N.M. Const. art. XVI, §2. In a region of the country where it is understood that there is not enough water in the natural streams to satisfy competing demands, superiority of right based on priority became the basis of sound, sensible government.

Priority of appropriation is not a mere factor in settling interstate water disputes – it is the paramount basis of decision, to be modified or varied to protect existing economies as the facts of each case warrant. Where the fortuity of a political boundary has fostered the development of conflicting demands on a finite resource and there are existing enterprises dependent on the continued flow of a stream in both states, the Court has understandably been reluctant to simply order economies, albeit based on junior appropriations, out of existence. Accordingly, the Court has held that "priority of appropriation is the guiding principle," but that "established uses should be protected even though strict application of the priority rule might jeopardize them." *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945).

In this case appropriations of Vermejo water began in New Mexico in 1867. The river has been fully appropriated in New Mexico for nearly a century, and no use or diversion of Vermejo waters has ever been made in Colorado. In 1975, Colorado Fuel and Iron Steel Corporation (C.F. & I.) obtained an inchoate right in state court in Colorado to make a transmountain diversion of the Vermejo headwaters sometime in the future. At odds in this case are the existing equities derived from the historic use of Vermejo water in New Mexico and the possibility of an equitable interest arising in the future in Colorado.

In *Arizona v. California*, 373 U.S. 546 (1963), the Court accepted the Special Master's conclusion that "it would be

unreasonable in the extreme" to award water for a future use at the expense of existing uses. However, in this case, the Master has recommended that the Court depart from the guiding principle of priority of appropriation and instead utilize a new test which balances the economic efficiency of existing uses against the efficiency of proposed uses to determine which rights are entitled to interstate water. Instead of effecting an equitable apportionment of interstate waters, the Master would make a division of water despite the equities in this case.

II

The design of Colorado's evidentiary presentation was twofold: to minimize the need for Vermejo water in New Mexico and to inflate the amount of water available for diversion by New Mexico. On the one hand, Colorado asserted that the historic diversion demand in New Mexico should be defined as the comparatively limited uses resulting from drought in the 1970s, contrary to the law of both states and contrary to the applicable federal common law. *Nebraska v. Wyoming*, 325 U.S. 589 (1945). On the other hand, Colorado assessed the "available" water in New Mexico on the basis of average annual discharge, which the Court has expressly rejected for the purpose of determing dependable supply. *Wyoming v. Colorado*, 259 U.S. 419, 471, 476 (1922); *Colorado v. Kansas*, 320 U.S. 383, 396-397 (1943). In combination with his distorted view of the basis of equitable apportionment, the Master has inexplicably adopted Colorado's exaggerative procedures.

III

Upon learning of C.F. & I.'s decreed inchoate right, four New Mexico water users – Kaiser Steel Corporation, Phelps Dodge Corporation, Vermejo Park Corporation, and the Vermejo Conservancy District – filed suit on April 26, 1976, in federal district court, to enjoin C.F. & I. from diverting Vermejo

waters "unless and until [their] prior rights [had] been satisfied." The court enjoined C.F. & I. from an out-of-priority diversion in 1978. *Kaiser Steel Corporation et al. v. C.F. & I. Steel Corporation*, Civil No. 76-244 (D.N.M. 1978). Instead of trusting its conspicuously junior priority to a stream which is historically short of supply for existing uses, C.F. & I. did not undertake its diversion, but persuaded the State of Colorado to file this action to try to circumvent the injunction. C.F. & I.'s fear of priority of appropriation demonstrates the fact that its proposed diversion of Vermejo waters would cause extensive injury to existing New Mexico uses. If no injury would occur, the existing injunction would be meaningless, and there would have been no reason for these lawsuits. Corporations are as they act, not as they say.

IV

The equity inherent in the Court's reliance on prior appropriation in equitable apportionment litigation is apparent in its logical extension: laches. Twice the Court has articulated sovereign inaction in terms of laches. *Washington v. Oregon*, 297 U.S. 517 (1936); *Colorado v. Kansas*, 320 U.S. 383 (1943). Here, the Vermejo has been fully appropriated in New Mexico without any corresponding development in Colorado. This condition has persisted for nearly 100 years. Colorado comes a little late to invoke "the high equity that moves the conscience of the court in giving judgment between states." *North Dakota v. Minnesota*, 263 U.S. 365 (1933).

V

The Eleventh Amendment prevents Colorado from lending its name to C.F. & I. The facts show that C.F. & I. persuaded Colorado to file this action after it had been enjoined in federal district court. C.F. & I. owns the entire Vermejo drainage in Colorado, and there is no other intending appropriation in Colorado. In order to file this suit, Colorado abandoned its own

interest in Vermejo waters. The last semblance of a true action *parens patriae* disappeared when C.F. & I.'s general counsel was made a special assistant attorney general to pursue the litigation. While the Court has recognized the validity of *parens patriae* claims, "this principle does not go so far as to permit resort to our original jurisdiction in the name of a state but in reality for the benefit of particular individuals." *Oklahoma v. Cook*, 304 U.S. 387, 394 (1938).

ARGUMENT

INTRODUCTION

The Vermejo River is a small, non-navigable stream formed by three tributaries rising on the southeastern slopes of the Sangre de Cristo Mountains some six miles above the Colorado-New Mexico state line. These tributaries, Ricardo Creek, Little Vermejo Creek, and the North Fork, combine to form the mainstem of the Vermejo approximately one mile below the state line. The drainage area in Colorado consists of a rugged mountain slope which drops precipitously into New Mexico. It is inaccessible for much of the year and uninhabited. The geography of the Vermejo River drainage is such that the full utilization of the Vermejo developed historically in New Mexico. No use or diversion of Vermejo waters has ever been made in Colorado.

Judged by eastern standards, the Vermejo is not large. During the summer months it is about five feet wide and one foot deep. From Colorado the Vermejo flows southeasterly into New Mexico through 35 miles of dissected plateau and across rolling plains to its confluence with the Canadian River. The climate of the Vermejo region is semi-arid.

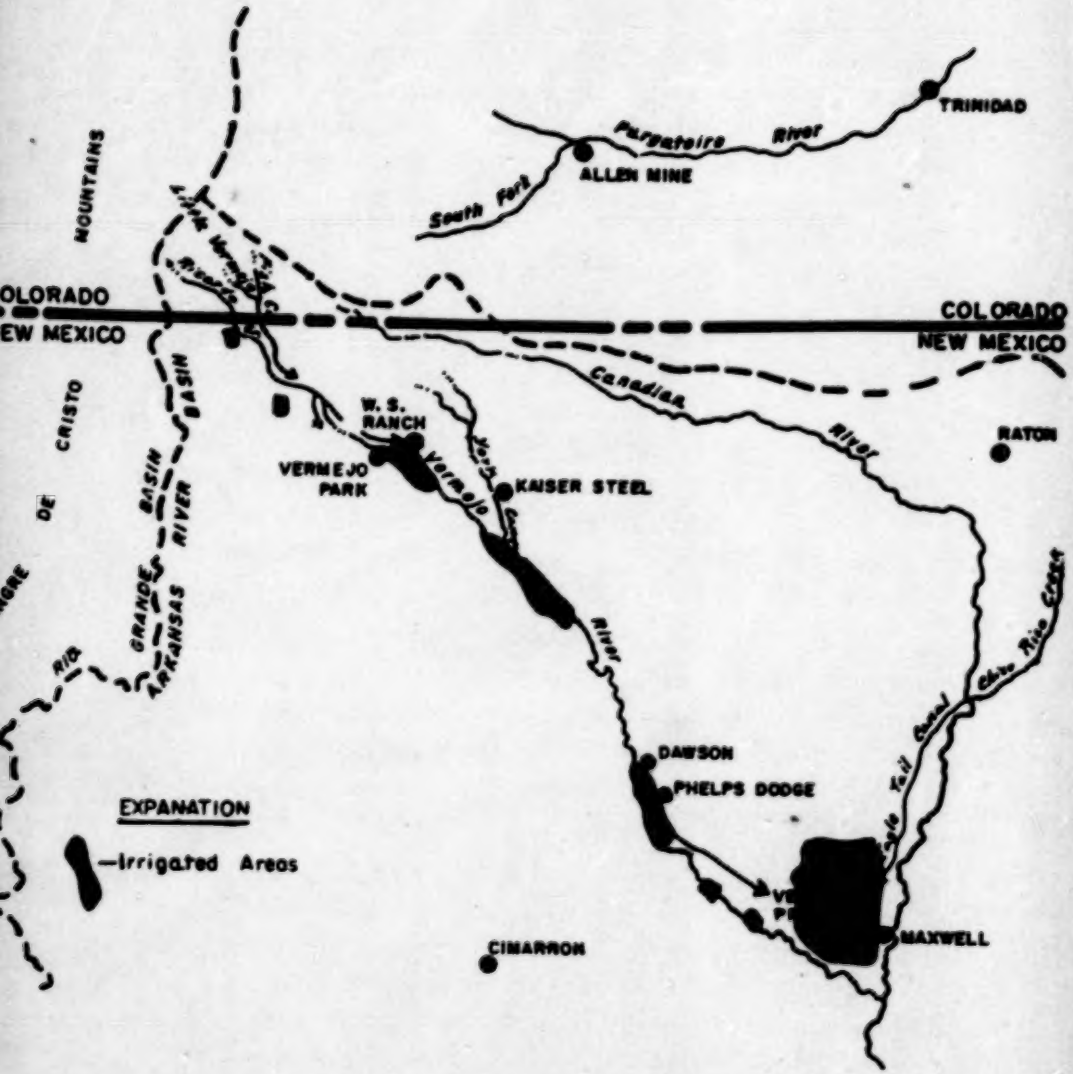
In contrast to the absence of any beneficial uses in Colorado, an agricultural and industrial economy has developed in New

Mexico from the beneficial use of Vermejo waters dating back to 1867. The river was fully appropriated in New Mexico around the turn of the century. New Mexico's present uses are depicted in the map facing this page. They depend primarily on direct flow diversions from the base flow of the river which runs down from the tributaries in Colorado in the form of snow-melt runoff during the irrigation season. No groundwater is available as a practical alternative. (Tr. at 1752-1797). In addition, New Mexico's uses must contend with chronic shortages.

The uses in New Mexico have produced an economy which the evidence has shown to be dependent on the uninterrupted flow of Vermejo water. The role that is played by these interests in the life of Colfax County is critical. The evidence has shown that there would be extensive economic injury to Colfax County if diversions were made upstream in Colorado.

On May 12, 1975, Colorado Fuel and Iron Steel Corporation (C.F. & I.) obtained an inchoate right in state court in Colorado for a proposed transmountain diversion of the headwaters of the Vermejo into the Purgatoire River system for a planned industrial development of corporate property in Las Animas County, Colorado.

Upon learning of C.F. & I.'s inchoate right, four New Mexico water users – Kaiser Steel Corporation, Phelps Dodge Corporation, Vermejo Park Corporation, and the Vermejo Conservancy District – filed suit in federal district court to enjoin C.F. & I. from diverting Vermejo waters until their senior rights have been satisfied. Applying the principles of prior appropriation indigenous to both Colorado and New Mexico, the federal district court entered an order on January 16, 1978, enjoining C.F. & I. from any out-of-priority diversion of Vermejo waters. *Kaiser Steel Corporation et al. v. C.F. & I. Steel Corporation,* Civil No. 76-244, (D.N.M. 1978). The district court order


TRINIDAD
Purgatoire River
ALLEN MINE
South Fork
COLORADO
NEW MEXICO
COLORADO
NEW MEXICO
Canadian River
RATON
W. S. RANCH
VERMEJO PARK
KAISER STEEL
DAWSON
PHELPS DODGE
MAXWELL
CIMARRON
EXPANATION
—Irrigated Areas

placed upon C.F. & I. the decision whether to risk investment in its transmountain diversion works on the basis of its junior priority.

In both Colorado and New Mexico water rights are initiated and perfected pursuant to the doctrine of prior appropriation. Colo. Const. art. XVI, § 5, 6; N.M. Const. art. XVI, § 1. In both states priority of appropriation controls the internal administration of water rights. The critical feature of the doctrine is the priority of senior rights. 1 Clark, *Waters and Water Rights*, § 51.6 (1967). Senior appropriators in both states are entitled to the full protection of their interests before water is passed to junior appropriators. Colo. Rev. Stat. § 37-92-301(3); § 72-1-2, N.M.S.A. 1978. The law of prior appropriation was developed in the arid states from practice and necessity. *E.g., Atchison v. Peterson*, 20 Wall. 507 (1874); *Basey v. Gallagher*, 20 Wall. 670 (1874); *Gutierres v. Albuquerque Land & Irrig. Co.*, 188 U.S. 545 (1903). It is a doctrine of water law which is founded upon the inadequacy of water to supply competing demands.

C.F. & I. elected not to construct its proposed diversion works. Instead of trusting its strikingly junior priority, C.F. & I. persuaded the State of Colorado to file this equitable apportionment action on the theory that the state might have some sovereign right to Vermejo waters that transcended C.F. & I.'s interests.

The water right granted to C.F. & I. by the Colorado state court in 1975 is an inchoate right to divert up to 75 cfs. (cubic feet per second) annually from the headwaters of the Vermejo. According to Colorado's figures, 75 cfs. is approximately 9 times the amount of water the river has provided historically. The only other application for a water right in Vermejo waters in Colorado was filed by the state itself on November 12, 1976, seeking a minimum instream flow of 5 cfs. to protect a rare species of trout. While C.F. & I. wishes to take water out of

the river in Colorado, Colorado wishes to keep the water in the river. Notwithstanding the conflict of interest, this action was filed in Colorado's name in order to provide C.F. & I. with a second opportunity to expropriate the property rights of New Mexico citizens.

At trial New Mexico's evidence proved the existence of extensive beneficial uses which are entitled to the protection of this Court. These interests are equitable interests. They derive from the law of prior appropriation adopted by the people and applied to enterprises on the Vermejo and Canadian Rivers. Colorado has no equitable interests in this case. Her use of the word in these proceedings has been totally without substance. There is no economy and no water use in Colorado which is dependent upon Vermejo flows.

POINT I

THE SPECIAL MASTER HAS MISCONSTRUED AND MISAPPLIED THE LAW OF EQUITABLE APPORTIONMENT, REJECTING THE JURISPRUDENTIAL UNDERPINNINGS OF THE FEDERAL COMMON LAW AND THE LAW COMMON TO BOTH STATES.

Equitable apportionment is a term that identifies a cause of action between states with conflicting interests in the use of interstate water. There are eight precedents. Each has been determined by principles which are intended to reflect the equities inherent in the actual use of interstate water within the states. In every instance the Court's primary objective has been to protect the existing economies which have developed from reliance on the use of water.

In this case all of the factors which create equities that have been recognized in equitable apportionment litigation are in

New Mexico. Because Colorado has never applied the water of the Vermejo River to beneficial use, she possesses no equities with which to justify an award of 4,000 acre-feet per annum. Instead of respecting the established uses on the river as deserving of the equitable protection of this Court, however, the Special Master has ignored them with the result that the existing social and economic reliance on Vermejo water in New Mexico is jeopardized.

Four cases are directly relevant to the facts at issue here: *Wyoming v. Colorado*, 259 U.S. 419 (1922); *Washington v. Oregon*, 297 U.S. 517 (1936); *Nebraska v. Wyoming*, 325 U.S. 589 (1945) and *Arizona v. California*, 373 U.S. 546 (1963). Like this case, each involved a suit to apportion waters between arid states which had adopted the doctrine of prior appropriation, and each except *Arizona v. California* involved a situation in which the river was either fully appropriated or nearly so. The unifying principle of these decisions is the objective of protecting existing interests which rely upon appropriations of water. This was achieved primarily through application of priority to existing diversions across the state line.[1]

Priority of appropriation is the guiding principle in equitable apportionment litigation in the western states.[2] *Nebraska v. Wyoming*, 325 U.S. at 618. Its equity is apparent. It best satisfies the purpose of protecting senior economies which depend on the diversion of water in order of priority. However,

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1. *See*, 2 Clark, *Waters and Water Rights*, §§ 132.2-132.5(B), pp. 331-347 (1967).

2. In applying the law of prior appropriation between prior appropriation states, the Court relied upon numerous federal and state court precedents involving the rights of private, interstate litigants wherein the court had uniformly reached the same result. *Willey v. Decker*, 11 Wyo. 496, 73 Pac. 210 (1903); *Howell v. Johnson*, 89 F. 556 (C.C.D. Mont. 1898); *Morris v. Bean*, 146 F. 423 (C.C.D. Mont. 1906); *aff'd*, *Bean v. Morris*, 221 U.S. 485 (1911).

it is not absolute. It can be varied, and has been, but only to protect junior economies which have developed in reliance on interstate water. In both cases, whether priority doctrine is applied or varied, the objective of protecting existing uses is the controlling factor. Instead of applying priority doctrine to protect New Mexico's economy in this case, the Special Master has reversed it to deny protection to that economy. By allowing C.F. & I. to divert 4,000 acre-feet annually instead of requiring that the remainder of the supply be delivered to New Mexico, the Master has given C.F. & I. the first priority on the river.

Wyoming v. Colorado, 259 U.S. 419 (1922)

The State of Wyoming sued Colorado and two Colorado corporations to prevent a proposed diversion from the Laramie River by two Colorado corporations. Wyoming asserted that the proposed diversions would not leave sufficient water to satisfy prior appropriations in Wyoming, causing irreparable injury to Wyoming's interests. Colorado denied this, arguing that she had the right to dispose of the waters within her borders "regardless of the prejudice that it may work" to Wyoming. 259 U.S. at 457.

The problem was that there were valid, established interests on both sides of the state line, additional proposed developments in Colorado, but only a finite supply of water in the river. The Court thus was required to determine and weigh the equities in the respective states in order to make a judgment on the validity of the proposed diversions in Colorado. It did so by assuring that the appropriations in both states would be respected by determining the actually divertible supply, and then allowing the excess for the proposed diversions in Colorado. 259 U.S. at 467.

The basis of the Court's opinion is that the protectable equities in the two states derive from their appropriations. Justice Van Devanter held that "*the interests of the State are indissolubly linked with the rights of the appropriators.* 259 U.S. at

468, emphasis added. His reasoning is clear. Under appropriation doctrine, where water is applied to beneficial use by different enterprises, the primary equities in the lawsuit are the actual appropriations and the social and economic dependence which results. 259 U.S. at 468. This allowed the conclusion that the apportionment should consist of the doctrine of prior appropriation applied interstate where that would satisfy the existing priorities in both states:

> We conclude that Colorado's objections to the doctrine of appropriation as a basis of decision are not well taken, and that it furnishes the only basis which is consonant with the principles of right and equity applicable to such a controversy as this is. The cardinal rule of the doctrine is that priority of appropriation gives superiority of right. Each of these States applies and enforces this rule in her own territory, and it is the one to which intending appropriators naturally would turn for guidance. The principle on which it proceeds is not less applicable to interstate streams and controversies than to others. 259 U.S. at 470.

The Court's decree resulted in the finding that existing Colorado diversions with senior priorities were entitled to 22,500 acre-feet and that existing Wyoming rights were entitled to 272,500 acre-feet per annum. The Court's independent calculations of divertible supply concluded that there remained 15,500 acre-feet available for the proposed diversions in Colorado. 259 U.S. at 495-496. The Court was therefore able to make a division of the Laramie River simply and equitably between the two parties on the basis of their existing uses and economies. It is an apportionment that is fair because it respects the equities derived from beneficial use in both states. The Court expressly rejected Colorado's contention that she could dispose of the water within her borders to the prejudice of existing uses in another state. 259 U.S. at 466. In the instant case Judge Kerr has recommended precisely the opposite. His

recommended apportionment will result in severe injury to established interests in New Mexico, Point II, *infra*, and will enable Colorado to do exactly what she was barred from doing in *Wyoming v. Colorado* – to dispose of water within her borders without regard to interests downstream.

Washington v. Oregon, 297 U.S. 517 (1936)

In this case the State of Washington filed suit against Oregon charging that Oregon was wrongfully diverting the waters of the Walla Walla River to the prejudice of inhabitants of Washington. At issue was an insufficient supply for diverters at the Gardena Farms District, adjudged a priority of 1892 by a Washington Court for the diversion of water to irrigate 7,000 acres of land. The facts reflect that there had been a "unity of growth in the development of the whole community . . . quite independent of the dividing line between the states." 297 U.S. at 520-521. One branch of the river, the Tum-a-lum, was entirely consumed by diversions in Oregon. The Court resolved this conflict on the basis of priority of appropriation applied interstate. 297 U.S. at 526-528. The Court held that no equitable interest could arise from appropriative rights that had not been exercised for a protracted period of time:

> Laches and abandonment, chargeable to the Gardena users, are found in the report. Not till 1930 was there a claim in their behalf to the beneficial use of waters of the river arising above the bridge. Not till then was such a claim advanced by Washington itself or by any of its residents. Without a sign of challenge, the Oregon users were allowed to develop their little settlement in the faith that their enjoyment of the waters was uncontested by any one. 297 U.S. at 528.

As a consequence, the Washington claim could not divest the rights in Oregon. 297 U.S. at 523. This case is exactly on point. It provides a specific example of the appropriation of an entire interstate river by users within one state. The Court rejected

Washington's position, which Colorado has adopted in this suit, that an apportionment can be made in favor of a state without existing uses from which to derive an equitable right to interstate waters. In this case, because Colorado has never made uses from the Vermejo, the facts are more compelling. The conditional right granted C.F. & I. is a right to make a diversion in the future. New Mexico's rights are the basis of existing enterprises which support the economy of Colfax County. In equity, the inchoate right of C.F. & I. cannot deprive the existing uses in New Mexico of the water they require.

The Master's discussion of the case entirely ignores this. Instead, he wrongfully states that there would have been no corresponding benefit to awarding Washington water for the Gardena Farms right because the water would not have reached Washington. This is incorrect. The facts establish that water would not have reached Washington only during periods of shortage. 297 U.S. at 522.

Nebraska v. Wyoming, 325 U.S. 589 (1945)

The court-ordered apportionment in *Nebraska v. Wyoming* resulted from allegations by Nebraska that Wyoming and Colorado were violating the rule of priority of appropriation adopted by the three states, thus depriving Nebraska of water to which she was entitled from the North Platte. The facts reflect an uneven development of economies dependent on the river in the three states. Prior to 1907 development was more rapid in Colorado and Wyoming than in Nebraska. Subsequently, there was greater development in Nebraska. 325 U.S. at 594. The tri-state area with interests in the North Platte was a patchwork of competing claims. For purposes of the decree it was organized by the Court into six sections corresponding to six naturally defined sections of the river basin. This enabled the Court to specifically apportion water along the various reaches in order to preserve the developments in each.

The holding in this case is the clearest example of the Court's efforts to protect existing economies. Because of the complexity of diversions in three states along six reaches of a river, protection to the existing uses could not be afforded through the strict application of priority doctrine. The adjustment necessary to protect existing interests was too intricate. Priority of appropriation remained the guiding principle, but was varied to protect established economies based upon junior appropriations:

> . . . (I)f an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible. For example, the economy of a region may have been established on the basis of junior appropriations. So far as possible those established uses should be protected though strict application of the priority rule might jeopardize them. Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. 325 U.S. at 618.

The Special Master is not correct in labeling priority of appropriation as just another factor on a parity with those enumerated by Justice Douglas. Justice Van Devanter called priority of appropriation "the cardinal rule" in *Wyoming v. Colorado*, 259 U.S. at 470; Justice Douglas called it "the guiding principle" in *Nebraska v. Wyoming*, 325 U.S. at 618. When it can be utilized, priority of appropriation will be the most equitable apportionment. In *Nebraska v. Wyoming*, where the Court varied a strict application of priority, the attempt was made to treat the various segments of the river by priorities. 325 U.S. at 628-646. Where the Court was able to apply appropriation doctrine it do so. Priority was strictly applied between Wyoming and Nebraska. 325 U.S. at 627. When alternative methods were adopted for various segments, the methods were scrutinized with respect to priority. As regards the Whalen to Tri-State Dam segment, for instance, Justice Douglas held, the

"alternative method has much to recommend it because of its rather strict adherence to the principle of priority during the periods of low flow." 325 U.S. at 644. In short, the Court has never wavered in its understanding that priority should control unless its application would undermine existing economies.

Arizona v. California, 373 U.S. 546 (1963)

The most incomprehensible portion of the Special Master's analysis is his dismissal of *Arizona v. California* as irrelevant to the issues. He writes that *Arizona v. California* was controlled by the Boulder Canyon Project Act, 45 Stat. 1057, 43 U.S.C. §§ 617-617t (1928) and that "no such statutory pronouncement has come from the Congress regarding the Vermejo River." (Report, p. 22).

Arizona v. California was an original action brought by Arizona to determine the apportionment of water among the lower basin states under the Colorado River Compact. Early in the opinion the Court distinguished the law applicable to the mainstem Colorado and that applicable to the tributaries. Only the former was controlled by Project Act; one tributary, the Gila River, was controlled by the principles of equitable apportionment. The Court said:

> Arizona and New Mexico presented the Master with conflicting claims to water in the Gila River, the tributary that rises in New Mexico and flows through Arizona. Having determined that tributaries are not within the regulatory provisions of the Project Act the Master held that *this interstate dispute should be decided under the principles of equitable apportionment.* After hearing evidence on this issue, the Master accepted a compromise settlement agreed upon by these States and incorporated that settlement in his findings and conclusions, and in Part IV (A) (B) (C) (D) of his recommended decree. 373 U.S. at 594-595, emphasis added.

New Mexico cited this case to the Special Master as the most important recent instance of the protection of existing appropriations in equitable apportionment litigation.

In *Arizona v. California*, New Mexico had argued that the doctrine of prior appropriation should be varied as applied to the Gila so that New Mexico's junior uses could be protected. The Special Master recommended:

> New Mexico seeks a confirmation of existing uses in that state from the Gila River System. Despite the fact that many of these uses are junior in time to uses downstream in Arizona, I conclude that they should not be disturbed.
>
> Although priority of appropriation has been characterized as the guiding principle of equitable apportionment in the arid regions of the United States, *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Wyoming v. Colorado*, 259 U.S. 419 (1922), it is by no means necessarily conclusive of the rights in dispute. In *Nebraska v. Wyoming*, *supra*, at 618, the Court said:
>
> > "Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to the downstream areas if a limitation is imposed on the former – these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made."
>
> It is worthy of note that the Court, in an equitable apportionment suit, has never reduced junior upstream existing uses by rigid application of priority of appropriation. Indeed, the tendency has been to protect existing uses wherever possible. See *Washington v. Oregon*,

297 U.S. 517 (1936); *Kansas v. Colorado*, 206 U.S. 46 (1907). Special Master Report, *Arizona v. California*, Dec. 5, 1960, pp. 325-327.

As recognized by the Master in this case, C.F. & I.'s proposed diversion will destroy the Vermejo Conservancy District in New Mexico. When there is no conflicting economy in Colorado, but only the possibility of a future economy, there can be no basis upon which to strike an equitable balance. If the Court were to adopt the Master's recommendations, it would effectively manufacture the conflict it is ordinarily called upon to resolve in equitable apportionment actions.[3]

These cases show that the Court has fashioned its decrees in equitable apportionment suits between western states adhering to appropriation doctrine when possible. As in *Wyoming v. Colorado* and *Washington v. Oregon*, priority of appropriation has been applied directly across state borders when that would result in an apportionment that preserved the existing uses. As in *Nebraska v. Wyoming* and *Arizona v. California*, it has been varied to protect an established economy created by junior appropriations.

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3. The Special Master's discussion of one case, *Hinderlider v. La Plata*, 304 U.S. 92 (1938) further illustrates his failure to comprehend the cases on which the Report is based. He believed that in *Hinderlider* the State of Colorado had unsuccessfully sought to set aside the La Plata River Compact between Colorado and New Mexico to protect rights within Colorado which were extinguished by provisions of the compact. (Report, p. 17). He writes: "*Hinderlider* is important because it reaffirms the Court's position that the doctrine of equitable apportionment is still the guiding principle, even though senior appropriators in one or both states may be damaged." (Report, p. 18). In fact, *Hinderlider* only stands for the validity of interstate water compacts. At no time did the State of Colorado challenge the compact. The state's position was the opposite. Colorado argued that the compact must be upheld. *La Plata River & Cherry Creek Ditch Co. v. Hinderlider*, 93 Colo. 128, 25 P.2d 187 (1933). *Hinderlider* was an effort by private appropriators to overcome the state's action.

Similarly, in two cases which involved apportionment questions between appropriation and riparian jurisdictions, the Court sought to protect the equities derived from actual appropriations. *Kansas v. Colorado*, 206 U.S. 46 (1907); *Colorado v. Kansas*, 320 U.S. 383 (1943). In both cases the issue was the extent to which Kansas could enjoin established uses in Colorado to maintain the flow of the Arkansas River which she alleged was essential to her interests. The Court's opinion in the prior case took careful note of the existing uses in Colorado. Between 1884 and 1891 considerable development took place in Colorado, and pursuant to the doctrine of prior appropriation the waters of the river were being diverted in growing amounts to non-riparian lands. 206 U.S. at 52. In 1902 there were 300,115 acres of actual irrigation in Colorado. 206 U.S. at 108. The Court recognized the equity inherent in Colorado's diversions and denied Kansas' suit. 206 U.S. at 102.

Subsequently, in *Colorado v. Kansas*, the Court reached the same result to avoid injuring those equities. The Special Master's Report, which would have tolerated injury to Colorado, was partially rejected:

> On this record there can be no doubt that a decree such as the Master recommends or an amendment or enlargement of that decree in the form Kansas asks, would inflict serious damage on existing agricultural interests in Colorado. How great the injury would be it is difficult to determine, but certainly the proposed decree would operate to deprive some citizens of Colorado, to some extent, of their means of support. It migh indeed result in the abandonment of valuable improvements and actual migration from farms. 320 U.S. at 394.

In this case Colorado has no uses and no economy dependent on the Vermejo. In New Mexico, the river is fully appropriated and supports an economy which is entirely dependent upon uninterrupted flows from the tributaries. (Tr. at 2364-2365; N.M. Ex. No. F-33 and Tr. at 2279; 2295; 2299). The purposes

for which the Court has varied prior appropriation doctrine are here served by applying it. Instead, the Master has recommended that virtually the entire base flow be given to Colorado for the purposes of a transmountain diversion into the adjacent Purgatoire system. New Mexico could not even benefit from return flows.

In this regard, it is evident from the Master's discussion of *Colorado v. Kansas* that he does not understand the significance of return flow in making adjustments between existing uses in equitable apportionments. He pointed out that in considering whether the Colorado diversions caused injury to the riparian rights in Kansas, the Court considered many factors, including return flow. He then concludes that "(n)one of these factors are relevant to the current action because . . . there is no possibility of a return flow as the Colorado diversion would be to another watershed. . . ." (Report, p. 18). The Master fails to comprehend that the Court considered return flow on the Arkansas because it would have benefited the Kansas users and mitigated any injury caused by the Colorado diversions. Return flows, of course, become part of the regimen of the stream and are available to downstream users. Instead of understanding the objective of the Court's analysis, the Master dismissed return flows here as irrelevant in the circumstance in which they are most relevant.[4]

In making his recommendation, the Master states that "any damages to New Mexico must be weighed against benefits which

4. In his discussion of *Colorado v. Kansas*, the Master similarly misunderstood the consideration of ground water, stating that it is irrelevant "to the current action because there is no ground water to speak of . . . ." (Report, p. 18). He is correct as a matter of fact; New Mexico put on evidence to show that its users would have no alternative source of supply if C.F. & I. took their water. (Tr. 1752-1797). What he doesn't understand is the concept. The Master dismisses an entire area of evidence as irrelevant in the circumstance in which it is most relevant.

will accrue to Colorado" and "injury if any, will be more than offset by the benefit to Colorado." (Report, pp. 17, 23). Legally, the Master relies on Colorado's status as a state and on his belief that the New Mexico uses are inefficient in comparison with the "corresponding benefits" from C.F. & I.'s proposed use. On both counts he's wrong. Sovereignty is not an equity; by itself the political status of a state is meaningless with respect to interstate streams. As Justice Van Devanter put it, "the interests of [a] state are indissolubly linked with the rights of the appropriators." *Wyoming v. Colorado*, 259 U.S. at 468. As to the balancing of comparative benefits, the Court has been explicit: "The fact that the same amount of water might produce more in lower sections of the river is immaterial." *Nebraska v. Wyoming*, 325 U.S. at 621.

Perhaps even more outrageous is the Master's balancing of existing equities and C.F. & I.'s proposed use. In this regard, *Arizona v. California* is directly on point again:

> New Mexico also claims the right to water for future requirements. It is here, however, that priority of appropriation has its greatest effect. *It would be unreasonable in the extreme to reserve water for future use in New Mexico when senior downstream appropriators in Arizona remain unsatisfied.* It was so held as to Colorado's claim in *Nebraska v. Wyoming*, 325 U.S. 589 (1945). Special Master Report, *Arizona v. California*, Dec. 5, 1960, p. 331, emphasis added.[5]

In this case it would be "unreasonable in the extreme" to award water for C.F. & I.'s future use when the senior downstream appropriators in New Mexico remain unsatisfied.

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5. It should be noted that New Mexico made the claim for future uses in *Arizona v. California* in anticipation of the future construction of then authorized storage facilities, which would have enabled new uses to be made without injury to existing uses in Arizona. *See*, Special Master Report, *Arizona v. California*, Dec. 5, 1960, p. 331. No such possibility is in evidence in this case. As Colorado's own case proves, C.F. & I. simply proposes to take the water to the detriment of New Mexico users.

POINT II

THE LEGAL CONCLUSION THAT THE COURT WILL BALANCE DETRIMENT TO EXISTING USES WITH BENEFIT FROM A FUTURE USE IS ERRONEOUS, AND THE SPECIAL MASTER'S CONCLUSION THEREUPON OF NON-INJURY TO NEW MEXICO INTERESTS IS NOT SUPPORTED BY THE EVIDENCE OR JUSTIFIABLE AS A MATTER OF LAW.

As a matter of law it is clear that priority of appropriation should control in an apportionment between states adhering to prior appropriation doctrine and that the application of priority has been varied only to avoid the disruption of an economy built upon junior appropriations. *See, e.g.*, 2 Clark, *Waters and Water Rights*, §§132.2-132.5(B), pp. 331-347 (1967); 3 Hutchins, *Water Rights Laws in the Nineteen Western States*, pp. 69-70 (1977). Accordingly, Colorado has been forced to ignore the obvious conclusion that it would be unreasonable in the extreme to make an award for a future use when existing uses remain unsatisfied. *Arizona v. California*, 373 U.S. 546 (1963).

Instead of making any sense out of law and equity, Colorado sought to establish a right to Vermejo waters by denigrating the amount, character, requirements, and extent of the existing New Mexico uses. The purpose of Colorado's evidence was twofold: to minimize the need for Vermejo water in New Mexico and to inflate the amount of water available for diversion by New Mexico rights. On the one hand, Colorado asserted that the historic diversion demand in New Mexico should be defined as the comparatively limited uses resulting from drought in the 1970s; on the other hand, Colorado's analysis of available Vermejo water equated total discharge, i.e., base flow and flood water, with divertible water.

With no legal explanation and no discussion of the operative facts, the Special Master reduced the amount of historically

irrigated acreage in New Mexico to the amount irrigated during a period of drought. He did not discuss the federal common law or the law of both Colorado and New Mexico which uniformly recognizes that the right to use water is not forfeited for non-use beyond the control of the appropriator. *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Beaver Brook Res. & Canal Co. v. St. Vrain Res. Co.*, 6 Colo. App. 130, 40 P. 1066 (1895); *State ex rel. Reynolds v. South Springs Co.*, 80 N.M. 144, 452 P.2d 478 (1969). The Master did indicate that "average annual flow data is not helpful in determining the availability of a dependable supply, particularly if the averages include flood waters," but he proceeded to use averages in any event on the mistaken understanding that New Mexico, like Colorado, used average annual discharge as a measure of the available supply. (Report, p. 19).

HISTORICALLY IRRIGATED ACREAGE IN NEW MEXICO

Vermejo Park Corporation

The Vermejo Park Corporation operates a cattle ranch containing farming operations and recreational activities. The ranch has decreed rights to irrigate 870.2 acres of land from the mainstem of the Vermejo with priority dates of 1873, 1876, and 1878. The irrigation rights are used in the production of improved grass and hay. Colorado described the historically irrigated acreage of the Vermejo Park Corporation in this way:

> The Vermejo Park Corporation only irrigates 230 to 250 acres (Charlesworth, Tr. 2068, 1097). (Post Hearing Brief at 50).

The source of the quotation is Jim Charlesworth, the manager of the Vermejo Park Corporation. Colorado intended the statement to define Vermejo Park's irrigation requirements in terms of its historical needs. Colorado's conclusion is directly contradicted by four elements of evidence: the complete testimony of

Mr. Charlesworth, the testimony of Mr. Armijo, the decreed acreage, and the evidence of drought.

Mr. Charlesworth testified that 250 acres had been cultivated since 1974, at the beginning of a drought cycle, and that there was additional acreage under cultivation in previous years. The testimony was as follows:

> A. It's quite obvious on Vermejo Park that sometime during the 60's there was a tremendous amount of more acreage irrigated than there is today due to the lack of water.
>
> Q. How do you know that?
>
> A. Well, when you drive down the Vermejo River and every field you see hay stacks of larger than this room, you know it's obvious at one point in time there was a lot of hay stored in these areas. They wouldn't build a hay stack just for the exercise of it.
>
> Q. Did the testimony you gave in your description purport to make a statement as to "historically irrigated acres" or to discuss the amount of acres irrigated prior to the time when you came on in 1974?
>
> A. No, sir. My deposition was referring only to the period of time since my employment with Vermejo Park Corportation. (Tr. at 2074).
>
> * * *
>
> Q. I would like you to characterize the statement that appears in Colorado's Exhibit No. 6 from the standpoint of your deposition testimony.
>
> Would you say that any interpretation or conclusion of your testimony to the effect that 200 acres was the historically irrigated amount of acreage on the Vermejo Park Corporation was a correct conclusion or an incorrect conclusion?
>
> A. That is an incorrect conclusion. (Tr. at 2075).

Mr. Charlesworth's testimony was supported by Mr. Armijo. Mr. Armijo has been employed on the Vermejo Park

property since 1963. He testified that approximately 700 acres of land had been irrigated at Vermejo Park from the time he began work until the early 1970s.[6]

Kaiser Steel Corporation

Kaiser Steel Corporation owns mineral rights to 500,000 acres of land containing an estimated 1,000,000,000 tons of coal reserves and presently operates a mine at York Canyon which produces about $60,000,000 worth of coal annually. (Tr. at 1721). To obtain the water necessary to mine the coal, Kaiser purchased 230 acre-feet of rights and leased 400 acre-feet with priorities of 1867, 1877, 1883, and 1887. While the Master agrees that Kaiser's decreed rights total 630 acre-feet, he concludes that the corporation "diverts an average of only 251.28 acre feet per year." (Report, p. 5).

In 1980 Kaiser diverted 311 acre-feet of its water right. (Tr. at 1738). Each year Kaiser makes the difference between its total right of 630 acre-feet and the amount actually diverted the subject of an application to the State Engineer for an extension of time within which to apply the water to beneficial use. *See*, §72-5-14 (N.M.S.A. 1978). As Kaiser develops its coal reserves, its water rights will be exercised on a gradually expanding basis.

Apparently forgetting the testimony of Mr. Taylor, Kaiser's Director of Coal Operations and Engineering from Oakland, California, to the effect that the water rights were obtained in anticipation of planned expansion (Tr. at 1727-1732), the

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6. Mr. Armijo testified to the amount of acreage irrigated from each ditch in the sixties as follows:

(a) Shy Ditch – 40 acres
(b) Young Ditch – 400 acres
(c) Baca-Vigil Ditch – 50 acres
(d) Reed Ditch – 40 acres
(e) Montoya Ditch – 60 acres
(f) Torres Ditch – 100 acres

(Tr. at 2124-2126).

Special Master castigated Kaiser for "never [having] diverted its full decreed appropriation, although the flow . . . would indicate that more than enough water [was] available . . . ." (Report, p. 5). Presumably on the basis of his view that Kaiser should have been diverting its full right and Colorado's baseless assertion that Kaiser's rights "appear to have been abandoned" (Post Hearing Brief at 52), the Master has limited Kaiser to a water right which not only thwarts its development plans but takes Kaiser back in time.[7]

Kaiser's rights are essential to maintaining production at its York Canyon Mine. Kaiser Steel is the major employer in Colfax County, and the mine accounts for nearly $32,000,000 in annual revenues to the economy. (Tr. at 1733). Based on a misunderstanding of Kaiser's operation and water requirements, the Master makes water for C.F. & I. by taking it from Kaiser.

Phelps Dodge Corporation

The Phelps Dodge Corporation owns rights to irrigate 501.19 acres of land. The priority is 1867. Two hundred acres of rights or 400 acre-feet of water have been leased to Kaiser Steel. The remaining land is farmed under lease to the CS Cattle Company which is obliged to divert the necessary water to preserve the irrigation right. (Tr. at 2140-2141). The Master described the right as no more than 150 acres. (Report, p. 7).

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7. Colorado's suggestion that the rights have been abandoned is groundless. Under New Mexico water law no right may be changed in purpose or place of use when such a change would impair the exercise of existing rights. §§72-5-23 & 72-5-24 (N.M.S.A. 1978). Each applicant desiring to effect a change in place or purpose of use is required to prove the nature and extent of his right. *Spencer v. Bliss*, 60 N.M. 16, 287 P.2d 221 (1955). The issue of abandonment is thus implicit in a transfer. It was considered at the time of the Kaiser's transfer, and the court determined that the rights had not been forfeited. *W. S. Ranch Co. v. Kaiser Steel Corporation*, 79 N.M. 65, 439 P.2d 714 (1968).

As Mr. Porter's testimony showed, the historically irrigated amount of acreage is more than 150 acres of land. Mr. Porter is the ranch foreman on the Phelps Dodge property. He has been employed by the CS Cattle Company for 45 years and has worked on and been familiar with this property since 1935. (Tr. at 2171-2172). He testified as follows to the irrigated acreage on the property:

> Q. I want to refer to a period of time now that will be before the flood that has been testified to by Mr. Davis that occurred in 1965. In referring to that period of time, do you know whether Phelps Dodge farmed or actually farmed the Vermejo acreage prior to that time?
>
> A. Yes, to my knowledge they did.
>
> Q. Are you able to testify to the extent of acreages or the extent of acres that were under cultivation at that time?
>
> A. I believe there were 450 to 500 acres to the best of my knowledge. (Tr. at 2174).

Following the flood, Phelps Dodge recognized that the damage to the property was so extensive that irrigation would not be possible until the acreage had been reclaimed and a new diversion system built. The corporation therefore entered into a lease with Kaiser Steel to avoid any possibility that the rights would be forfeited under New Mexico law. (N.M. Ex. No. E-20; Tr. at 2145-2146).

Vermejo Conservancy District

The Vermejo Conservancy District is an association of sixty-three farms, in addition to the Maxwell Wildlife Refuge, which irrigates 7,380 acres of land. The Special Master's Report makes no findings of fact with respect to the District's rights. Implicit throughout the Report is that the District's rights and requirements are irrelevant because it is inefficient and should not have been established:

> The Vermejo Conservancy District has never been an economically feasible operation. Payments for the project have not been made for many years and the possibility of future payments being made is remote. Most of the people in the area have income from sources other than farming and ranching. (Report, p. 23).

The Master seems to recognize that his recommendations will result in injury to the District, but he believes that for the reasons quoted above that this would not be inequitable to New Mexico. Additionally, he said:

> It should be noted that the facts of this case establish that the Vermejo Conservancy District does not have an economically feasible operation. There is no competent evidence which would indicate that the District will ever be able to meet its debts and live up to its expectations, and for this reason, the impact of a Colorado diversion on New Mexico users, as a whole, would be minimal. (Report, p. 10).

In other words, the Special Master believes that because the District has experienced chronic water shortages, it cannot assert its rights as equities in this suit.

The Master is mistaken. Mr. Robert Weimer, the Southwestern Regional Director of the Bureau of Reclamation, testified that repayment by the District to the United States Government for the capital costs of the project were made in 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974 and a partial payment in 1975. (Tr. at 1519). He testified that the lack of payments since 1975 was due to the shortage of water supply which affected the ability of the District to make its repayment obligation. (Tr. at 1519-1520). Mr. Weimer testified further that to the best of his knowledge the District had always met its operation and maintenance obligations. (Tr. at 1525-1526).

The Vermejo Conservancy District is operating and delivering the divertible water supply of Vermejo River and Chico Rico

Creek to its water users. Even with the severe water shortages experienced in the 1970s, the District was able to provide for the operation and maintenance of its works and to deliver water. The record shows that an award of 3,650 acre-feet to Colorado would reduce the historic supply available to the Vermejo Conservancy District by 33%. (Tr. at 1324). The Master's recommendation of 4,000 acre-feet for C.F. & I. would effectively destroy the District, including the United States' Maxwell Wildlife Refuge, and transform approximately 8,000 acres of irrigated farmland into desert.

Other Uses Diverting From the Vermejo Canal

The Special Master makes no analysis at all of the needs of five interests diverting from the main canal of the Vermejo Conservancy District. These include farms belonging to Carl Odom, Ray Porter, Joseph Pompeo, Eual Messick and a tract belonging to the Vermejo Park Corporation. They are not members of the Vermejo Conservancy District. They own water rights for the irrigation of 478 acres of land. There is no indication or description of any kind in the Special Master's Report of the needs of these individuals or of the impact of his recommendation on their interests. These equities are excluded from the Report, apparently because the Master did not consider either their existence or the injury they would suffer as a consequence of his recommendation as equitable factors in this case.

In sum, the Special Master's Report fails to provide an accurate or complete picture of water use from the mainstem Vermejo River by which to evaluate New Mexico's equities. While C.F. & I.'s future needs were carefully considered, New Mexico's existing uses were not. The Special Master made no specific findings of fact for the amount of acre-feet of water historically required by the Vermejo Park Corporation or the Vermejo Conservancy District. (Report, pp. 5, 7). He completely

omitted the five individual appropriators from the Report. His discussion of the Kaiser Steel and Phelps Dodge rights would impose a forfeiture of the major portion of their water rights. (Report, pp. 6, 7).[8]

The Master's analysis is illogical and inequitable. It contrasts sharply with the practice in previous apportionment actions in which the Court has specified and quantified irrigation rights at great length. *Kansas v. Colorado*, 206 U.S. 46 (1907); *Wyoming v. Colorado*, 259 U.S. 419 (1922); *Washington v. Oregon*, 297 U.S. 517 (1936); *Nebraska v. Wyoming*, 325 U.S. 589 (1945).

The incompleteness of the Report as respects New Mexico's uses makes one conclusion inescapable. The Special Master could not have completely considered New Mexico's interests in making his recommendations to the Court. They are not represented in the Report.

SUPPLY TO THE CANADIAN RIVER

The Special Master has erred in excluding 41,150 acres of irrigated land on the Canadian River from his considerations together with the storage rights of Conchas and Ute Reservoirs amounting to 300,000 acre-feet and up to 350,000 acre-feet, respectively. (Report, p. 4). New Mexico's testimony shows that all of these rights are supplied in part by the Vermejo. (Tr. at 1044; 1131-1132). Under New Mexico law these users have rights in Vermejo waters. In the words of Colorado's witness, however, the Canadian River users of Vermejo water were not "deemed to be relevant." (Tr. at 303).

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8. The Court's analysis of irrigated acreage is found in these cases as follows:
   1. *Kansas v. Colorado* at pages 51 and 108-113.
   2. *Wyoming v. Colorado* at pages 475-495.
   3. *Washington v. Oregon* throughout the opinion.
   4. *Nebraska v. Wyoming* at pages 621-656 and in the decree.

Colorado provided no analysis of use on the Canadian for three reasons: 1) the Vermejo Conservancy District has never relinquished water to downstream users; 2) there is no requirement to relinquish water; and 3) neither New Mexico nor the downstream users have made calls on Vermejo uses to pass water down to them. (Tr. at 282-283). All three reasons are absurd, particularly the last, which the Master relied upon. (Report, p. 4). Under New Mexico's law of prior appropriation, the date of priority provides the senior right and entitlement to water. N.M. Const. art. XVI, §2; §72-7-1 (N.M.S.A. 1978). The same is true of all appropriation states. Junior users cannot call upon seniors unless they are exceeding their right. The Canadian rights are junior to those on the Vermejo.

The second reason the Master refused to consider the Canadian users was his incomprehensible opinion that "(t)here was no competent evidence of any dependency on Vermejo water by users downstream from the Vermejo Conservancy District." (Report, p. 4). The Master apparently overlooked or disregarded conclusive evidence to the contrary by the New Mexico users and officials from the New Mexico Interstate Stream Commission and the U.S. Bureau of Reclamation. For instance, New Mexico Ex. No. F-47 shows that for the period 1950-1979, the average peak discharge of the Vermejo was 2,200 cfs., nearly four times the capacity of the Vermejo Canal, and on 74 separate occasions the discharge exceeded the capacity of the canal. In the Definite Plan Report for the Vermejo Project prepared by the Bureau of Reclamation (N.M. Ex. No. C-2 at 41), an operation study was performed to evaluate the project performance based on the plan that was subsequently adopted. The study was based on 32 years of streamflow records of the Vermejo River. The study computed the average annual spill at the Vermejo diversion to be nearly 7,100 acre-feet. *See, also,* N.M. Ex. Nos. F-26 and F-48. The testimony also showed that Vermejo water supplies the Canadian users.

(Tr. at 1044; 1131-1132). Mr. Strawn, a Director of the Arch Hurley Conservancy District, testified to the interest of Canadian users in Vermejo water. (Tr. at 2218-2236). A recommendation by the Master which ignores these facts is valueless.[9]

THE DIVERTIBLE SUPPLY OF WATER IN NEW MEXICO

It is critical to draw a distinction between average annual flow and divertible supply. The Court has recognized that average flows are necessarily inflated by flood flows which are not divertible. *Wyoming v. Colorado, supra* at 471, 476; *Colorado v. Kansas*, 320 U.S. 383, 396-397 (1943). The objective of New Mexico's evidence was to present the Master with the available and divertible supply of water. This was misunderstood by the Special Master. He writes that "of major importance" is the fact that average annual flow data is not helpful in determining the availability of a dependable supply, particularly if the averages include flood waters." (Report, p. 19). But he then concludes: "Both Colorado and New Mexico used average flows in their testimony and exhibits before the Special Master." (Report, p. 19).

The sole portion of New Mexico's evidence which relied on estimates of average annual flow was that portion of the Vermejo lying within Colorado for which data was not available

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9. One item in evidence may have impressed the Master. Colorado utilized data from a flow duration curve introduced by New Mexico to display stream flow and basin characteristics. N.M. Ex. No. F-18. The figure Colorado produced is superficially impressive, *i.e.*, the flow of the Vermejo exceeded the capacity of the Vermejo Conservancy District's diversion works one tenth of one percent of the time. In reality, Colorado's conclusion has little meaning because it does not purport to analyze amounts. The flow duration curve was developed entirely from mean daily flow data, *i.e.*, without peak flow data. Colorado used the mean data as if they were peak data, which, rather obviously, is not very telling.

to precisely determine annual flows. (N.M. Ex. No. F-20). For the rest of its hydrologic analysis, New Mexico's evidence included annual precipitation data, annual, monthly, and daily stream flow data; a monthly study of the historic water supply to the Vermejo Conservancy District summarized on an annual basis in Defendant's Exhibit F-29; monthly streamflow hydrographs and monthly irrigation diversion requirements, daily streamflow for flow duration and peak flow analysis; and annual data on irrigated acreage and water prorations for the Vermejo Conservancy District. New Mexico's evidence compared monthly streamflow records measured against the monthly diversion requirements of the irrigators during the irrigation season. Colorado simply used an average yearly figure from the gage at Dawson for the 1955-1979 period and therefore failed to show the divertible supply and the existence of shortages on the Vermejo.[10] Colorado's evidence was thus distorted by the presence of flood flows.

Flood flows are largely unusable to irrigators because they rush past the headgates carrying debris and silt. (*E.g.*, Tr. at 2199).

In *Colorado v. Kansas, supra,* the Court described the "critical matter" with respect to Kansas' alleged injury as "the amount of divertible flow at times when water is most needed for irrigation. Calculations of average annual flow, which include flood flows, are, therefore, not helpful in ascertaining the dependable supply of water usable for irrigation." 320 U.S. at 396-397. The point was emphasized further by the Court in *Wyoming v. Colorado:*

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10. New Mexico's evidence of shortage consisted in part of the testimony of the water users who are faced with it. Charlesworth (Tr. at 2077-2078; 2080; 2084); Taylor (Tr. at 1741-1742); Porter (Tr. at 2177); Odom (Tr. at 2214). Colorado's evidence of non-shortage consisted of the belief of one witness with no experience on the river that shortages did not really exist. (Tr. at 2611-2615).

> Colorado's evidence, which for convenience, we take up first, is directed to showing the average yearly flow of all years in a considerable period, as if that constituted a proper measure of the available supply. We think it is not a proper measure. This is because of the great variation in the flow. . . .259 U.S. at 471.
>
> * * *
>
> Crops cannot be grown on expectations of average flows which do not come, nor on recollections of unusual flows which have passed down the stream in prior years. Only when the water is actually applied does the soil respond. 259 U.S. at 476.

Colorado's conclusions on the water flow in the Vermejo are composed entirely of average annual flows.

INJURY TO NEW MEXICO

The Special Master's Report provides no justification for his conclusion that New Mexico interests would not be injured by a diversion of 4,000 acre-feet per annum in Colorado. It ignores the extent of New Mexico's existing rights, dismisses entirely the rights of the Vermejo Conservancy District and the five private users diverting from the District's works, and distorts the divertible supply of water for those rights. It rejects the claims of users downstream on the Canadian River with rights in Vermejo water. New Mexico's decreed and licensed rights are depicted on Appendix B.

New Mexico's expert testimony as well as the testimony of the water users themselves unequivocally shows that extensive injury to established interests would result from the Special Master's recommendation. The uncontroverted evidence in this case is that no excess water exists in the Vermejo River for new uses or for export.

Appendix A depicts the effects on existing New Mexico users from C.F. & I. taking 3,600 acre-feet annually, 400 acre-

feet less than the Master's recommendation. While New Mexico does not agree that Colorado has correctly determined the amount of historic use in New Mexico, Appendix A was calculated on the basis of Colo. Ex. Nos. 69 and 70. Even on the basis of Colorado's inaccurate figures, it is clear that there will be injury to the mainstem Vermejo users, not to mention the Canadian users. In essence, the Special Master's recommendation would deprive New Mexico rights of the base flow essential for their diversions. Because of the physical characteristics of the Vermejo, the drainage in Colorado receives the greatest amount of precipitation in low flow years and provides the essential snowmelt runoff during the early part of the irrigation season.

N.M. Ex. No. A-130 is a seepage investigation made on the Vermejo River in September and October, 1980 which measured visible accretions and diversions from the river and which shows no gain between the state line and the Dawson gage. The seepage run demonstrates conclusively that 94% of the water in the Vermejo River at York Canyon came from the Colorado portion of the drainage area and that the net gain between the state line and York Canyon is only 0.47 cfs., 50% of Kaiser Steel's daily diversion demand at York Canyon. It shows that the river lost 1.4 cfs. between York Canyon and the Dawson gage.

The impact of the diversions in Colorado would be greatest in the Vermejo Conservancy District. The severe annual water shortages to the Vermejo Conservancy District are shown in Defendant's Exhibits F-22 and F-37. The average annual shortage to the demand of the Vermejo Conservancy District was computed to be 6,300 acre-feet per year for the period 1955-1979, inclusive, or 57% of the demand of the District's 7,380 irrigated acres. (Tr. at 1309-1311).

Depending on the conditions in a given year there would be injury to all of the users on the Vermejo in the form of in-

creased shortages, caused by C.F. & I.'s reduction of the base flow by diversions from the tributaries, a concern expressed by Mr. Taylor of Kaiser Steel. (Tr. at 1739).[11] These diversions would increase the severe shortages experienced by the District (Tr. at 1311), and by the direct flow users such as Vermejo Park, Kaiser, Ray Porter, Joe Pompeo and Carl Odom. (Tr. at 1323). Particularly during low flow months in the irrigation season both Vermejo Park Corporation and Kaiser Steel as well as the private users would suffer. (Tr. at 1379-1380). The effects on Vermejo Park and Kaiser Steel are also shown by N.M. Ex. No. F-21 Revised and N.M. Ex. No. F-30, the latter of which uses Colorado's own figures for water production from the tributaries. N.M. Ex. No. F-30, in particular, demonstrates the effects on Vermejo Park and Kaiser of diversions in Colorado during individual months. (Tr. at 1260-1261). For example, if in May of 1977 diversions of 340 acre-feet had been made in Colorado increased shortages would have been felt by Vermejo Park and Kaiser. Similarly, had C.F. & I. taken 180 acre-feet in September of 1977, the river at Dawson could have been dry. (Tr. at 1260). Neither Vermejo Park nor Kaiser can afford not to have water during the low flow periods. (Tr. at 1262). For Vermejo Park, this would reduce the yield of perennial crops to zero. For Kaiser, the lack of water would force the mine to cease operations. (Tr. at 1262).

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11. The following testimony complements Appendix A. It represents the impact of Colorado's diversions as seen by New Mexico's witnesses and the water users themselves. Mr. Mutz, (Tr. at 1324-1326); Mr. Charlesworth of Vermejo Park Corportation, (Tr. at 2090-2092); Mr. Taylor of Kaiser Steel, (Tr. at 1730-1732); Mr. Ochs of the Bureau of Reclamation, (Tr. at 1652-1653); Mr. Odom, (Tr. at 2216-2217); Mr. Pompeo, (Tr. at 2205); Mr. Knox of the Vermejo Conservancy District, (Tr. at 1837-1838); Mr. Spencer of the Vermejo Conservancy District, (Tr. at 1964-1965); and Mr. Brock of the Maxwell National Wildlife Refuge, (Tr. at 2045).

Finally, the evidence shows the economic injury and the disruption of the economy dependent on Vermejo flows in Colfax County that would result from diversions by C.F. and I. Steel Corporation in Colorado. Defendant's Exhibit No. F-33 establishes the interdependence and reliance of industry and agriculture on the flow of the river in terms of both primary and indirect benefits. (N.M. Ex. No. F-33 at 40-48). Dr. Brown, who prepared Exhibit No. F-33, concluded his testimony by discussing the effects of diversions in Colorado. The impact of C.F. & I.'s proposed diversion on labor in New Mexico would be nearly 2,000 lost jobs or 31% of the work force in Colfax County. The impact in dollars would be astronomical. (Tr. at 2257-2260; 2294-2296; 2299-2300).

POINT III

C.F. & I.'s PARTICIPATION IN THIS LAWSUIT DEMONSTRATES THAT EXISTING APPROPRIATORS IN NEW MEXICO WOULD BE INJURED BY C.F. & I.'s PROPOSED DIVERSION.

The Report of the Special Master is ambiguous. There are two ways to analyze his treatment of the evidence with respect to injury to the existing New Mexico appropriations. Either he found, as a matter of fact, that C.F. & I.'s proposed diversion would not cause injury in New Mexico or he concluded, as a matter of law, that the Court should balance injury to existing rights in one state against potential benefit from a future use in another, thus enabling him to say that there would be no injury because it would be offset. (Report, pp. 10, 17, 23).[12]

12. The latter was ruled upon by the Court in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and expressly rejected as a basis for apportioning interstate water. 325 U.S. at 621.

We believe he did the latter, which is legally erroneous, but we expect that Colorado will urge that he did the former. If the Master did make a finding that no injury would result in New Mexico, he could have done so only because he did not understand the evidence or evaluate it completely, which we have addressed in Point II, *supra*. Here, we discuss the ultimate contradiction of finding, on the one hand, that Colorado would not receive any Vermejo water if priority of appropriation were applied and, on the other, that no injury would result from C.F. & I.'s proposed diversion. (Report, pp. 10, 17, 21). The two are mutually exclusive. If there would be no injury there would be no reason not to apply priority of appropriation.

With few exceptions the principle of priority of appropriation prevails in the water rights jurisprudence of the West. *See, Jennison v. Kirk*, 98 U.S. 453, 457-458 (1878); *Arizona v. California*, 298 U.S. 558, 565-566 (1936). It is embodied in the constitutions of most western states, including Colorado and New Mexico. Colo. Const. art. XVI, §6; N.M. Const. art. XVI, §2. The priority of a particular appropriation is represented by a date. All appropriations of water from the same source of supply having earlier dates of priority are senior in right and all having later dates of priority are junior in right. In practice each senior appropriator is constitutionally entitled to receive his whole supply before any subsequent appropriator has any right. Priority is so important that a water right in the West is commonly referred to as a priority. In the words of the Colorado Supreme Court:

> Property rights in water consist not alone in the amount of the appropriation, but, also, in the *priority* of the appropriation. It often happens that the chief value of an appropriation consists in its priority over other appropriations from the same natural stream. Hence,

> to deprive a person of his *priority* is to deprive him of a most valuable property right. *Nichols v. McIntosh*, 19 Colo. 22, 27, 34 P. 278, 280 (1893).

Given the shortage of supply in the eleven arid and semi-arid western states, priority of appropriation has formed the basis of security in investment and enterprise.

The one fact common to all of the western states and territories which adopted priority of appropriation is the inadequacy of water to supply all of the competing demands. If every appropriator from a given stream were free to divert the full amount of his right without regard to priority, injury to others and chaos in administration would prevail. The constraint of priority, however, is designed to prevent injury to those with senior rights and to maintain order in times of shortage. It is only when there is sufficient water in the stream to satisfy all rights simultaneously that priority is insignificant.

By erroneously equating flood flows with useable, divertible flows, C.F. & I. urged that there is sufficient water in the Vermejo to satisfy all existing New Mexico uses and its proposed diversion.[13] C.F. & I.'s tack before the Master, however, should be contrasted with its true belief. The existing injunction against C.F. & I. does not enjoin the company from constructing its works and making a diversion, but rather it enjoins the company from making any out-of-priority diversion. *Kaiser Steel Corporation et al. v. C.F. & I. Steel Corporation*, Civil No. 76-244 (D.N.M. 1978). If C.F. & I. truly believed there were sufficient water to satisfy all existing New Mexico uses and its proposed diversion, the corporation would not have invested considerable

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13. Colorado, however, ignores some 41,000 acres of irrigation on the Canadian River in New Mexico which are entitled to Vermejo water and are chronically short. Point II, *supra*.

sums and numerous years in pursuing this litigation. The company simply would have constructed its works and undertaken its diversion, and we all would have lived happily ever after.

The fact of the matter is that an award of 4,000 acre-feet to C.F. & I. with the first priority on the river would destroy the Vermejo Conservancy District and the rights of the private individuals who utilize the District's works and cripple Kaiser Steel's coal mining operations during periods of low flow. Severe injury would also result to Vermejo Park Corporation. Point II, *supra*. The uncontradicted evidence shows that an award of 3,650 acre-feet per annum would comprise 33% of the average historic water supply received by the Vermejo Conservancy District during the period 1955-1979. (N.M. Ex. Nos. F-20, F-37; Tr. at 1324).

In assessing the evidence of water supply in the Vermejo, the Master looked only to the expert testimony. He stated incorrectly that "both Colorado and New Mexico computed and used statistical averages in their exhibits and analysis, . . . [resulting in Colorado's] figure of 11,035 acre feet at the [Dawson] gauge, while New Mexico's computations resulted in a figure of 9,800 acre feet."[14] (Report, p. 2). More importantly,

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14. These averages are merely the summation of annual flows for the period selected, divided by the number of years in the period. Computations of stream flow do appear in Colorado's estimation of flow at the state line, where Colorado calculated 284 months of flow on the basis of 16 months of record. The Master did not understand this either, characterizing Colorado's calculations as "actual measurements." (Report, p. 4). In contrast to these "actual measurements," the Master characterized New Mexico's altitude-runoff relationship as a "statistical analysis which is based upon rainfall in other areas and the subsequent calculation of

(Cont. p. 41)

however, there is no mention in the Master's report of the lay testimony with respect to chronic water shortage in New Mexico. This testimony is the most significant because it displays the actual experience of the irrigators.

Colorado produced at trial no witness with anything other than a brief, academic familiarity with the Vermejo River. New Mexico, on the other hand, produced numerous farmers and farm managers who have lived and farmed on the river for decades. Their testimony uniformly complemented the testimony of New Mexico's experts. For example, Mr. Charlesworth of Vermejo Park Corporation testified to his efforts to irrigate more land and his intention of doing so if water were available (Tr. at 2084).

> Q. Why aren't you irrigating more acres?
>
> A. Well, as I have repeatedly stated, each year in a majority of the years since Pennzoil has owned Vermejo Park, since Vermejo Park bought the property, we have tried to develop additional acreage to grow the crops that are necessary for us.
>
> We can get one watering on them, but the predictability of getting another watering on them or two more waterings on them is nearly impossible. It has proven impossible. (Tr. at 2077-2078).

Mr. Porter of C.S. Cattle Co. testified that he is presently irrigating as much as he feels is possible. (Tr. at 2180). New

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14. (Cont. from p. 40)

probabilities." (*Id.*, p. 4). The Master was mistaken. New Mexico's analysis involved no probabilities. It was based on actual altitudes and actual, measured discharge in the Vermejo and several adjacent watersheds. It was undertaken because of the paucity of actual data that C.F. & I., by contrast, elected to use.

Mexico Exhibit No. F-37 shows – without contradiction – that the Vermejo Conservancy District has historically received only 57% of the water supply necessary to irrigate the project acreage. The testimony of farmers in the District described their problems with shortage in more graphic terms. (Tr. at 1811-1817; 1945; 1983-1988; 2010-2012). This evidence reflects years of experience. Colorado's expert witness, by contrast, testified that he didn't believe that shortages really existed in New Mexico. (Tr. at 2611-2615).

If the Court were to consider that the evidence of the experts is balanced, the lay testimony of the farmers would be dispositive. We submit that no fair and reasonable fact finder could ignore the testimony of Bureau of Reclamation officials, farmers, and ranchers who know the river from experience. Judge Kerr apparently did, and we believe his conclusion is patently wrong. C.F. & I.'s fear of priority of appropriation confirms our position.

POINT IV

COLORADO IS BARRED BY LACHES FROM AN APPORTIONMENT OF THE VERMEJO THAT WOULD IMPAIR EXISTING RIGHTS IN NEW MEXICO.

The clearest expression of the Court's reliance on prior appropriation as the guiding principle in equitable apportionment litigation has been its use of laches. This occurred in circumstances virtually identical to those at issue here. In *Washington v. Oregon*, 297 U.S. 517 (1936), the Court decided an original action in which the State of Washington claimed the right to the use of interstate waters which were fully appropriated in Oregon. The stream in question, the Tum-a-lum,

was tributary to the Walla Walla River and was claimed in its entirety by Oregon on the basis of senior priorities. An interest in Washington, Gardena Farms, had undertaken diversions from the Tum-a-lum in the 1890s and claimed a priority for these rights of 1892. The Court found that beneficial use of the waters had not been made until 1930. 297 U.S. at 528. The earlier effort to establish beneficial use had been abandoned. The court concluded that it would be inequitable to deprive the existing economy in Oregon for the benefit of a claim derived from such a tenuous history of use. This was articulated in terms of laches:

> To restrain the diversion at the bridge would bring distress and even ruin to a long established settlement of tillers of the soil for no other or better purpose than to vindicate a barren right. This is not the high equity that moves the conscience of the court in giving judgment between states. *North Dakota v. Minnesota, supra; Connecticut v. Massachusetts, supra; Kansas v. Colorado,* 206 U.S. 46, 109. Far from being that, it is rather "the *summum jus* of power." *Mutual Life Insurance Co. v. Johnson,* 293 U.S. 335, 339. In default of reasons for removal more urgent and compelling, the tillers of the soil will be left where they have settled. *Cf., Hough v. Porter,* 51 Ore. 318; 415; 95 Pac. 732; 98 Pac. 1083; 102 Pac. 728; *Matheson v. Ward,* 24 Wash. 407, 411; 64 Pac. 520. 297 U.S. at 523.

In this case the facts are far stronger. As the evidence has shown, the region dependent on the Vermejo in New Mexico was settled and developed between the mid-1860s and the admission of the territory to statehood in 1912. During this time there was no corresponding development in Colorado. Water from the Vermejo tributaries flowed downstream across the border where it was put to beneficial use without competing diversions and without objection from the upstream state. This condition persisted for nearly 100 years.

Similarly, in *Colorado v. Kansas*, 320 U.S. 383 (1943), the Court was sensitive to the impact that would have occurred to Colorado's uses as a result of Kansas' inaction. In refusing to adopt the Master's proposed decree, which would have enjoined existing Colorado uses, the Court stated:

> Through practice of irrigation, Colorado's agriculture in the basin has grown steadily for fifty years. With this development has gone a large investment in canals, reservoirs and farms. The progress has been open. The facts were of common knowledge.
>
> The controversy was litigated in 1901. Kansas was denied relief in 1907. The dispute between appropriators in the two States was brought into court in 1910 and settled in 1916. The Finney County Association sued Colorado appropriators in 1916 and 1923. Even if Kansas' claims of increased depletion and ensuing damage are taken at face value, it is nevertheless evident that while improvements based upon irrigation went forward in Colorado for twenty-one years, Kansas took no action until Colorado filed the instant complaint in 1928.
>
> These facts might well preclude the award of the relief Kansas asks. But, in any event, they gravely add to the burden she would otherwise bear, and must be weighed in estimating the equities of the case. 320 U.S. at 394.

In deciding these cases on the basis of laches, the Court resolved two equitable apportionment actions by preserving the economies dependent on existing beneficial uses. There are two elements in the Court's reasoning. Reliance on existing uses of interstate water is the dominant equity. From the opposite prespective, the failure of a state to display some sovereign interest in interstate waters acts as a bar to disrupting the existing dependence in another state. The instant case provides the clearest example for the application of this principle.

POINT V

A STATE CANNOT MAINTAIN AN ORIGINAL ACTION *PARENS PATRIAE* FOR THE SOLE PURPOSE OF NULLIFYING AN INJUNCTION AGAINST A SINGLE CORPORATION.

After being enjoined by the federal district court, C.F. & I. persuaded the State of Colorado to file this action in its behalf. *Kaiser Steel Corporation et al. v. C.F. & I. Steel Corporation*, Civil No. 76-244 (1978). Notwithstanding Colorado's conflicting desire to maintain minimum instream flows (*see*, Cause No. W-4530, Water Division No. 2), Colorado abandoned its own interest and filed this suit in an attempt to undo the injunction issued by the federal district court.[15] This action, therefore, must be scrutinized under the Eleventh Amendment to the United States Constitution.[16]

Before filing suit Colorado and C.F. & I. decided to enter "compact negotiations" for the sake of appearances. A memorandum that was meant to be a confidential communication to Governor Lamm, but was inadvertently sent to Governor Apodaca of New Mexico, reads:

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15. C.F. & I. has tried to explain that the conflict is resolved by C.F. & I.'s senior priority, i.e., 1975, as opposed to the Colorado Water Conservation Board's priority of 1976 to maintain the flow in the stream instead of diverting it trans-mountain. However, the fact that there is only enough water to satisfy a senior water right is no reason to conclude that the junior rightholder no longer has an interest in having his right satisfied. Also, as a practical matter, the Colorado Water Conservation Board could have declined to recommend that this suit be filed, thus effectively protecting its junior right.

16. Amendment XI (1798): "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

The rawbone facts are as follows:

1. C.F. & I. Steel Corp. obtained a conditional water right decree from the state water court in Water Division No. 2 for a certain volume of water out of Fish Creek, Ricardo Creek and Little Vermejo Creek, all tributary to the Vermejo River and the North Canadian River in New Mexico. These streams rise on the southern edge of the Maxwell Land Grant and flow south into the State of New Mexico where they have traditionally been used by water interests within the State of New Mexico.

2. The water in these streams has never been utilized for beneficial purposes within the State of Colorado except for stock watering by free roaming stock on the Maxwell Land Grant.

3. C.F. & I. Steel Corporation proposes to erect diversion structures on the three streams and divert a substantial portion of the water therefrom through tunnels and conduits over the Divide to the drainage of the Purgatory River for use in coal mining operations in and around Trinidad.

* * *

It is the opinion of this office and counsel for C.F. & I. that such a nonjudicial approach is far favorable to filing an immediate proceeding in the U.S. Supreme Court between the two states and might well place this state on a better footing should such an original proceeding have to be filed in the future.[17] (N.M. Ex. No. E-19).

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17. The "compact negotiations" were promptly terminated by New Mexico because it was apparent that Colorado was in no position to claim an interest in the Vermejo:

> An equitable apportionment arises out of the necessity to compromise existing conflicting interests. New Mexico has an existing vested interest in the form of historic water uses, on which, as I mentioned earlier, is predicated an economy. Colorado would appear to have no existing vested interest . . . .
>
> One view of these negotiations, accordingly, would be to lend

(Cont. p. 47)

The memorandum reveals that the only interest under consideration in the proposed litigation was that of C.F. & I. and that counsel for C.F. & I. was participating actively in planning the lawsuit. No others participated in negotiations with state officials. (Tr. at 776-779). When the suit was filed, C.F. & I.'s general counsel was commissioned as a Special Assistant Attorney General to pursue the litigation.

In an early Eleventh Amendment case, the Court put the issue this way: "whether a State can allow the use of its name in . . . a suit for the benefit of one of its citizens." *New Hampshire and New York v. Louisiana,* 108 U.S. 76, 88 (1883). The Court held that its original jurisdiction could not extend to an action that, as Louisiana had described, was "merely a vicarious controversy between individuals." 108 U.S. at 84.

In Oklahoma v. Cook, 304 U.S. 387 (1938), the Court's analysis was designed to reveal the real party in interest and thus to determine if there was jurisdiction under article III, §2.

> To bring a case within that jurisdiction, it is not enough that a State is plaintiff. *Florida v.Mellon,* 273 U.S. 12, 17. Nor is it enough that a State has acquired the legal title to a cause of action against the defendant, where the recovery is sought for the benefit of another who is the real party in interest. *New Hampshire v. Louisiana,* 108 U.S. 76. 304 U.S. at 392.
>
> * * *
>
> The underlying point of decision was that in determining the scope of our original jurisdiction under

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17. (Cont. from p. 46)

> the appearance of bargaining power for the purpose of . . . subsequent litigation. (Vermejo River Negotiations Between Appointed Representatives of the States of New Mexico and Colorado, Tuesday, May 19, 1977, at 56-64, Colo. Ex. No. 53).

New Mexico believed the negotiations were specious, straining comity between the two states.

> clause 2 of section 2 of article 3 of the Constitution, we must look beyond the mere legal title of the complaining State to the cause of action asserted and to the nature of the State's interest. 304 U.S. at 393.

The Court recognized the validity of *parens patriae* claims, but held:

> . . . this principle does not go so far as to permit resort to our original jurisdiction in the name of the State but in reality for the benefit of particular individuals, albeit the State asserts an economic interest in the claims and declares their enforcement to be a matter of state policy. 304 U.S. at 394.

In circumstances where it is apparent that a state is effectively intervening to vindicate a claim or interest of a single corporation, the Court has held that the Eleventh Amendment is a bar to suit. In *Kansas v. United States,* 204 U.S. 331 (1907), a railroad company was involved:

> In these circumstances we think it apparent that the name of the State is being used simply for the prosecution in this court of the claim of the railroad company, and our original jurisdiction can not be maintained. 204 U.S. at 341.

The facts in this case show that the real interest of Colorado is in maintaining minimum instream flows in the Vermejo tributaries pursuant to Colo. Rev. Stat. §§37-93-102 and 103. This was the purpose of the Colorado Water Conservation Board's filing on November 12, 1976, for a minimum instream flow of 5 cfs. in the Vermejo tributaries in Cause No. W-4530, an action which undermined C.F. & I.'s efforts and in the words of C.F. & I.'s general counsel, created "apparent inconsistencies." (Vermejo River Negotiations Between Appointed Representatives of the States of New Mexico and Colorado, Tuesday, May 19, 1977, at 54). There are no other potential users of Vermejo water in Colorado, except by contract with C.F. & I.

In securing the enactment of the Eleventh Amendment its proponents were not seeking to bar the redress of private grievances – C.F. and I. certainly has recourse to the lower federal courts to litigate issues pertaining to its conditional right. Indeed it has done so and lost. We ask that the Court recognize the real party in interest in this suit and refuse to permit C.F. & I. to pull itself up by Colorado's bootstraps.

CONCLUSION

The federal common law in disputes over interstate waters in the West is unarguably that "the guiding principle" of priority of appropriation should be applied except to protect an existing economy based on established junior uses. Judge Rifkind expressed the principle succinctly when he stated that "it would be unreasonable in the extreme" to reserve water for a future use to the detriment of existing uses. *Arizona v. California,* 373 U.S. 546 (1963).

The guiding principle is directly applicable to the facts in this case. The Special Master correctly identified the factual circumstance which distinguishes this case from previous equitable apportionment cases:

> The unique circumstance which confronts the Master in this case is Colorado's failure to divert water and put it to beneficial use at any time in the past. New Mexico has applied the water and has existing economies which are dependent upon that water. (Report, p. 21).

What the Master fails to discern is that priority of appropriation is perfectly suited to the protection of existing equities on the Vermejo River.

The Special Master has characterized the cause of action in this case – equitable apportionment – as "the guiding principle itself." (Report, p. 17). His approach is unprecedented. Instead

of applying the body of federal common law that defines the substance of equitable apportionment, the Master started from the radical proposition that the water must be divided despite the existing dependence in the State of New Mexico. As a consequence, the Master has recommended that the Court decree a profound change in the nature of the property rights in this interstate stream. No longer would junior appropriations be property rights contingent upon the prior satisfaction of senior rights. Instead, junior rights would assume coercive force when they would have been legally meaningless before, and senior rights would be emptied of their heretofore inviolate legal status.

In the past the Court has applied priority of appropriation because it protects the integrity of existing property rights and the economies established thereupon. In this case the Master's approach does the opposite; he recommends that the Court disregard the existing economies which are dependent upon Vermejo water because, in his view, the benefit Colorado would reap from C.F. & I.'s proposed diversion would "offset" the injury to New Mexico. We submit that the Master's recommendation is alien to the jurisprudence of the Court.

Respectfully submitted,

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April 7, 1982

APPENDIX A

Effect on New Mexico Water Users of Colorado Taking
3600 ac. ft. of Vermejo River Water from Colo. Exhibits 69 and 70[1/]

Item	Supply Available: Without Diversion by CF&I	Supply Available: With CF&I Diverting 3600 Ac. Ft.	Effect on New Mexico
Flow at State Line	5500 ac. ft.	1900 ac. ft.	- 3600 ac. ft.
Vermejo Park depletions	600 ac. ft.	230 ac. ft.	- 370 ac. ft.
Kaiser Steel depletions	90 " "	240 " "	+ 150 " "
Phelps Dodge depletions	600 " "	200 " "	- 400 " "
Spills at Vermejo Conservancy diversion	300 " "	210 " "	- 90 " "
Vermejo Canal loss	1100 " "	830 " "	- 270 " "
Delivery to side (private) users	1000 " "	870 " "	- 130 " "
Conservancy Reservoir Evap.	3150 " "	2850 " "	- 300 " "
Conservancy Stockwater Release	2000 " "	35 " "	- 1965 " "
Canal and lateral loss	2830 " "	2740 " "	- 90 " "
Field irrigation loss	1180 " "	1140 " "	- 40 " "
Conservancy Irrigation Water	3540 " "	3440 " "	- 100 " "
		Total	- 3605 " "

1/New Mexico does not agree that Colorado has correctly determined the amount of use in N.M. It is noted that in these exhibits Colorado has intermingled streamflow for two periods of time without adjustment of the numbers.

APPENDIX B

VERMEJO RIVER DECREE OF 1941

Adjudicated Water Right Owner	Acreage	Date of Earliest Appropriation
Southwest Land Co. (Vermejo Park Corp.)	870.2 mainstem 801.0 tributaries	1873
Phelps Dodge Corporation	501.19 (301.19)[1]	1867
Holland Duell (Present owner: Eual Messick)	163.40 (48.40)[1]	1883
Josib Subat (Present owner: Joe Pompeo)	101.50	1883
John Caraglio (Present owner: Ray Porter)	16.49	1906
W. S. Land & Cattle Co. (Present owner: Vermejo Park)	46.73	1879
Guido Federici (Present owner: Mrs. Sam LaRoe)	82.99	1882
Tom Farmer (Present owner: Mrs. Sam LaRoe)	181.70	1884
Maxwell Irrigation Company (Vermejo Conservancy District)	14,621.55	1888
Kaiser Steel Corporation	(315.0)[1]	1867

CANADIAN RIVER USES WITH RIGHTS IN VERMEJO RIVER WATER

Arch Hurley Conservancy District (N.M. Ex. Nos. G-4; G-5; G-28).
Bell Ranch (N.M. Ex. No. G-18).
Ute Dam (N.M. Ex. No. G-16).
Bruhn and sons (N.M. Ex. No. G-17).
Sabinoso irrigation rights (Tr. at 1055).

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1. Kaiser Steel Corporation leased 200 acres or 400 acre feet of water rights from Phelps Dodge Corporation and has purchased 115 acres of water rights or 230 acre feet from the Holland Duell right and has transferred the resulting 630 acre feet to industrial and associated reclamation use at the York Canyon Mine. (N.M. Ex. Nos. G-2; G-11; G-12).

CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify that I am a member of the bar of this Court and counsel of record for the defendants and that on April 7, 1982, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be mailed the requisite number of copies of the foregoing Exceptions and Brief, by first class mail, postage prepaid, to the following officials of the State of Colorado:

The Honorable Richard D. Lamm
Governor of the State of Colorado
136 State Capitol
Denver, Colorado 80203

The Honorable J. D. MacFarlane
Attorney General of the State of Colorado
1525 Sherman, 3rd Floor
Denver, Colorado 80203

I certify that on April 7, 1982, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be served by Purolator courier service the requisite number of copies of the foregoing Exceptions and Brief, on the following counsel of record:

Mr. Dawes Montgomery
Assistant Attorney General
Attorney General's Office
Natural Resources Section
1525 Sherman Street, 3rd Floor
Denver, Colorado 80203

Mr. Robert F. Welborn
Assistant Attorney General
Welborn, Dufford, Cook & Brown
1100 United Bank Center
Denver, Colorado 80290

I certify that all parties required to be served have been served.

RICHARD A. SIMMS
Special Assistant Attorney General

FILED
APR 23 1982
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CLERK

No. 80, Original

IN THE

Supreme Court of the United States

October Term, 1977

STATE OF COLORADO, *Plaintiff*

v.

STATE OF NEW MEXICO
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE OF
NEW MEXICO, *Defendants*

MOTION TO LENGTHEN ORAL ARGUMENT

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NEW MEXICO, *Defendants*

MOTION TO LENGTHEN ORAL ARGUMENT

Comes now the defendant, State of New Mexico, pursuant to Rule 38(3) of the Rules of the Supreme Court of the United States, and hereby moves the Court to lengthen the time allowed for oral argument to one hour. In support thereof, New Mexico states:

1. The evidence presented to the Special Master consisted in large part of technical studies relating to basin discharge, stream flow, irrigation efficiency, and the divertible supply of water available to rights in New Mexico. While the Special Master made no specific findings or conclusions, his narrative statement of the evidence shows that he misconceived the importance of some of the evidence and misapplied the significance of other evidence.

2. The Special Master made his recommendation on the basis of his understanding of nine decisions of the Court, eight of which were equitable apportionment actions wherein the Court appointed a master to hear the evidence. The Special Master did not discuss the masters' reports in the cases to which he referred, which may account in part for his misunderstanding of the case decisions.

3. This original action is of great importance to the State of New Mexico in that an adverse decision resulting from the Court's adoption of the Special Master's Report would have a profoundly adverse impact upon the economy of Colfax County, New Mexico.

4. The decision of the Court in this case will establish an important precedent that will affect rights on interstate streams throughout the western United States.

5. One half hour does not provide enough time to explicate the factual misunderstandings and explain the reasoning beneath the Court's decisions in previous equitable apportionment actions.

WHEREFORE, the State of New Mexico moves the Court to extend its time for oral argument to one hour.

Respectfully submitted,

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April 21, 1982

CERTIFICATE OF SERVICE

I, Jay F. Stein, hereby certify that I am a member of the bar of this Court and counsel of record for the defendants and that on April 21, 1982, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be mailed the requisite number of copies of the foregoing Motion to Lengthen Oral Argument, by first class mail, postage prepaid, to the following officials of the State of Colorado:

The Honorable Richard D. Lamm
Governor of the State of Colorado
136 State Capitol
Denver, Colorado 80203

The Honorable J. D. MacFarlane
Attorney General of the State
of Colorado
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Denver, Colorado 80203

I certify that on April 21, 1982, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be mailed the requisite number of copies of the foregoing Motion to Lengthen Oral Argument, by first class mail, postage prepaid, to the following counsel of record:

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I certify that all parties required to be served have been served.

Jay F. Stein

JAY F. STEIN
Special Assistant Attorney General

Office - Supreme Court, U.S.
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MAY 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 80, Original

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

STATE OF COLORADO, *Plaintiff*

v.

STATE OF NEW MEXICO
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE OF
NEW MEXICO, *Defendants*

REPLY BRIEF OF THE STATE OF COLORADO

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May 7, 1982

No. 80, Original

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REPLY BRIEF OF THE STATE OF COLORADO

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I. INTRODUCTION

This is a proceeding for the equitable apportionment of the waters of the Vermejo River, a river which originates in Colorado and flows into New Mexico. In June of 1978, the State of Colorado filed with this Court a Motion for Leave to File Complaint in an original proceeding. New Mexico resisted the Motion by filing a Brief in Opposition to Motion for Leave to File Complaint. Colorado filed a Reply Brief in Support of Motion for Leave to File Complaint.

On April 16, 1979, the Court granted Colorado's motion and appointed the Honorable Ewing T. Kerr, Senior Judge of the United States District Court for the District of Wyoming, as Special Master in this case. After an extensive presentation of evidence involving sixteen full days of trial, the Special Master issued his Report recommending that Colorado be allocated 4,000 acre feet of water per year from the Vermejo River. The Special Master concluded that the "equities require that Colorado receive her equitable share of Vermejo River waters." Report of the Special Master on the Equitable Apportionment of the Vermejo River, p. 23 (December 31, 1981) (hereinafter "Report").

Colorado believes the conclusions in the Special Master's Report are fully supported by the law of equitable apportionment, and by a weighing of all of the equities relevant to this proceeding. Furthermore, the evidence presented at trial showed that New Mexico had not sustained its burden of proving that the diversions in Colorado would cause sustantial injury to New Mexico users.

Our order of presentation in this brief will be as follows: a description of the Vermejo River system and the water claimants thereon, a summary of Colorado's argument, an analysis of the cases and law applicable to this equitable apportionment proceeding and, finally, a

discussion of basic considerations involved in the equities in this case, including a specific response to items in New Mexico's Exceptions to the Report of the Special Master and Brief in Support Thereof (hereinafter ("N.M. Br.").

As a preliminary matter, with the thought that it would be helpful to the Court, we will define the two basic terms which are used for water measurement:

> "Acre foot" is a volumetric measurement which means the amount of water required to cover one acre of ground one foot deep. One acre foot consequently equals 43,560 cubic feet or 325,900 gallons.
>
> "Cubic foot per second" (c.f.s.) is a rate of flow measurement which means, as its words indicate, the flow of one cubic foot of water per second past a given point. One c.f.s. produces 450 gallons per minute or approximately 2 (1.983) acre feet per day.

II. THE VERMEJO RIVER SYSTEM

A. Description

The Vermejo River originates on the eastern slope of the Sangre De Cristo Mountains in southern Colorado. Three tributaries — Ricardo Creek, Little Vermejo Creek, and the North Fork of the Vermejo — combine to form the Vermejo River approximately one mile south of the Colorado/New Mexico state line. Fish Creek joins the Little Vermejo Creek just above the state line. Other tributaries contribute water to the Vermejo River in New Mexico (Colo. Ex. 5, Fig. 1).

The Vermejo River flows generally southeast for a distance of roughly 55 miles before its confluence with the Canadian River about 4 miles southwest of Maxwell, New Mexico (*Id.*). However, the amount of water that actually flows from the Vermejo River into the Canadian River is negligible because the Vermejo Conservancy District diverts almost the entire flow at its diversion structure, the last diversion point on the Vermejo River.[1] The Special Master found that the Vermejo "is essentially a closed system" in that "little, if any, of the water of the Vermejo reaches the Canadian River."[2]

B. Hydrologic data

Streamflow data for the Vermejo River system is limited. There is only one operating U.S. Geological Survey stream gauging station in the Vermejo watershed. This station, located about 1½ miles above Dawson, New Mexico, operated intermittently between 1916 and 1928, and regularly from 1928 to the present. Records from that gauging station show an average annual flow for the entire recorded period of 12,919 acre feet (Colo. Ex. 5, Tbl. 2).

---

[1]During the thirty-year period 1950-1979, appreciable amounts of water spilled past the Vermejo Conservancy District's diversion structure in only six years, totaling for the thirty-year period only 6,900 acre feet. Such spills occur when flood flows exceed the capacity of the District's diversion structure (N.M. Ex. F-29, Colo. Ex. 66).

[2]This is demonstrated by evidence presented during the trial. It was admitted that there are never any calls for water below the headgate of the Vermejo Conservancy District, and Mr. Knox, president of the District, stated that the District has never had to bypass water for downstream users. (Tr. 1112, 1327; Knox Dep., pp. 34, 35, 40, 41; *see also* Bureau of Reclamation Definite Plan Report for the Vermejo Project, which states. "There is no requirement for bypassing water for downstream uses; therefore, it is all potentially divertible water for the project." (Colo. Ex. 19, p. 29.)

As with most rivers in the arid West, the annual flow of the Vermejo River is variable.[3] To determine the amount of water contributed by the Colorado portion of the Vermejo watershed, the State of Colorado and CF&I Steel Corporation, the owner of conditional water rights on the Vermejo in Colorado, undertook measurements. Measuring devices were installed on Ricardo Creek at the proposed point of diversion in Colorado and at the state line, and on Little Vermejo Creek at the state line (Tr. 722-727). Actual measurements were taken at these three locations during the years 1977, 1978, 1979 and 1980. The measurements for these years were used to estimate Colorado's water production as set forth in Colorado Exhibit No. 5, Table 4. These estimates showed an average annual production for Ricardo Creek of approximately 6,900 acre feet and for Little Vermejo Creek of approximately 1,500 acre feet, making up a total production of 8,400 acre feet annually (Tr. 2527, 2528). Because these figures do not include the water contribution from the North Fork of the Vermejo, the actual Colorado production would be somewhat larger.

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[3]Extensive evidence was presented as to the average annual flow of the Vermejo River. For the twenty-five year period selected by Colorado as its analysis period (1955-1979), the average annual flow at the Dawson station was 11,035 acre feet (Colo. Ex. 5, p. 4). Colorado chose its analysis period to correspond to the period of operation of the "rehabilitated" Vermejo Project (Colo.Ex. 5, p. 1). On the other hand, New Mexico generally used the twenty-nine year period of 1950-1978 for analysis. This period produced a significantly lower average annual flow at the Dawson gauging station of 9,800 acre feet. The figure is only 77% of the average annual flow for the entire period of record from 1916 to 1979. By using this analysis period, New Mexico's figures minimize the amount of water contributed from sources in Colorado and the amount of water that would be available for diversion by the Vermejo Conservancy District. Because New Mexico's twenty-nine year analysis period included the extremely dry years of 1950-1954 while excluding any of the wet years during the period 1940-1949, its figures are not fairly representative of the average annual flow at the Dawson gauging station (*see* Colo. Ex. 5, Tbl. 2).

New Mexico declined to be involved in taking measurements at the state line (Tr. 1119, 1120, 1141, 1142). Instead, New Mexico estimated the water produced in the Colorado watershed by altitude-runoff relationships using records from other drainages. The New Mexico estimate of the average annual production from Colorado was 5,500 acre feet, although this average was for a lower flow period (N.M. Ex. 36) than that used by Colorado (*see* fn. 3, *supra*).

The usefulness of four years' measurement at the state line was demonstrated shortly before trial when the 1980 figures for the Dawson gauge were obtained. These figures showed a discharge at that point for 1980 of 14,790 acre feet (Tr. 2532). The average for the four years at the Dawson gauge, 1977 through 1980, was very close to the average for the 1956-1980 twenty-five year period at that gauging station (Tr. 2530). Therefore, it is reasonable to assume that the Colorado measurements at the state line for these same four years would be fairly representative of the twenty-five year average. Both Mr. Wayne Criddle, a recognized water expert (Tr. 868, 869), and Dr. Everett Richardson of Colorado State University (Tr. 2477, 2517) testified to the value of actual measurements. The Special Master recognized the value of actual measurements (Report, p. 4).

These two figures, i.e., the state line figures and the Dawson gauge figures, cannot be used directly to obtain a percentage of the water which is contributed to the entire Vermejo River system from sources within Colorado. This is because the flow at the Dawson gauging station is not a virgin flow (Tr. 1402); it has been reduced by depletions upstream in New Mexico and does not include accretions to the Vermejo River between that gauging station and the Vermejo Conservancy District. The diversions between the state line and the Dawson gauge include those by Vermejo Park Corporation, Kaiser Steel Corporation, and, most notably, the diversions by stock-

ponds, fishponds and water detention dams.[4] The accretion below the Dawson gauge was estimated by a New Mexico witness to be at least 800 acre feet annually but he stated that it could be as much as 1,800 acre feet (Tr. 1405, 1406, 1463, 1464, 1465).

Colorado contributes approximately one-half of the water supply for the Vermejo River system (Colo. Ex. 5, Tbl. 7). Of this one-half, Colorado would take about one-half, i.e., approximately one-fourth of the Vermejo River virgin flow. *See* section V.A. of this brief.

C. Vermejo River appropriators

There are five major diversion points in the Vermejo River watershed. Starting from the upper end, there are the diversion points for conditional water rights decreed in Colorado which would divert water from three creeks, Ricardo, Little Vermejo and Fish. Next in order down the river are the diversions by the Vermejo Park Corporation, both from the river and its tributaries. Third is the Kaiser Steel Corporation diversion, which is the last one above the Dawson gauge. Below the Dawson gauge is the Phelps-Dodge diversion. Finally, there is the largest user in New Mexico, the Vermejo Conservancy District. It diverts through a canal with a 600 cubic foot per second capacity, supplying not only itself but several small users with separate water rights who divert from the canal before the water reaches the first District reservoir. A more complete description of these water rights follows.

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[4]These are referred to in the Bureau of Reclamation documents that will be discussed later (Colo. Exs. 37, 38, 40, 43, 44, 45, 48).

1. Colorado appropriators

CF&I Steel Corporation, a Colorado corporation, owns conditional water rights[5] in Colorado entitling it to divert a total of 75 cubic feet per second (c.f.s.): 45 c.f.s. from Ricardo Creek, 25 c.f.s. from Little Vermejo Creek and 5 c.f.s. from Fish Creek (Colo. Exs. 9 and 10). Water would be diverted from the three points and transported some eight miles through a ditch and 3,000 feet of tunnel to a storage point on Johnson Creek, a tributary of the Purgatoire River in Colorado (Colo. Ex. 15, p. 3). Colorado estimates that the amount of water available on an average annual basis at these diversion points is approximately 4,700 acre feet (Colo. Ex. 5, Tbl. 5). Thus, the 4,000 acre feet apportioned by the Special Master to Colorado would be less than all of the water available at

---

[5] In Colorado there are two types of water rights. They are defined in Colorado statutes, C.R.S. 1973, § 37-92-103. One type is what is commonly called an absolute right or just a water right. It is a right based on the diversion of water from a stream and actual beneficial usage of the water. The right becomes absolute upon such usage, *Archaleta v. Ditch Company*, 118 Colo. 43, 192 P.2d 891 (1948). The other type of right is a conditional water right which is a confirmed right to have in the future an absolute right if certain conditions are met. The conditional right concept was developed early in Colorado water law because of the need of persons undertaking sizeable projects to have certainty that once a project was completed it would have a water right of a particular priority date. By statute in Colorado, C.R.S. 1973, § 37-92-302, anyone may file an application in court for a conditional water right setting forth his plan for the development of an absolute water right, stating how much water will be involved and what the use will be. The court may then award him a conditional water right to the effect that if he completes his plan with reasonable diligence, he will have an absolute right to use the specified amount of water as of a priority date corresponding to the inception of the plan. To continue his conditional water right the person must come into court every four years and show that his plan is being pursued with "reasonable diligence," C.R.S., § 37-92-301(4). When the plan is completed and the water is put to beneficial use, his conditional water right is made absolute. The conditional water right is a firm, unassailable right so that the person can know with certainty that if the plan is completed with reasonable diligence, he will have the right to the water as of the decreed priority date.

these diversion points.[6] Nearly one-half of the water produced by Colorado is produced in the drainage below these points.

The Colorado need for Vermejo water was fully explained by a number of witnesses, including the Colorado State Engineer, Dr. Jeris Danielson (Tr. 536-540); Ralph Adkins representing CF&I Steel Corporation; and Messrs. Garlutzo, Latuda, Amato, Ryan and Soltis representing various public entities in the Purgatoire River Basin, into which Colorado's portion of the Vermejo River water would be diverted. These people testified as to the shortage of water in the Purgatoire River, the inability to satisfy anything but the most senior water rights, and the current and potential uses for water in the area (Tr. 626, 627, 639, 640, 663, 711; Colo. Exs. 13 and 15).

The uses of Vermejo water in Colorado would help alleviate water shortages and be used in industrial operations at coal mines, agriculture, timbering, power generation, domestic needs and other industrial operations, including synthetic fuel development (Colo. Exs. 13 and 15; Tr. 713, 714; coal washery, 738; synfuel, 739, 740; reclamation, 741; timber, 742; power, 744; agriculture, 744, 745, 746; domestic and reclamation, 747). Mr. Adkins, a Colorado witness, emphasized that there is immediate need for this Vermejo water for existing operations and agriculture in the Purgatoire Valley, for the various developments in the area and for the definitive planning for further growth (Tr. 794, 795).

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[6]New Mexico using, as indicated above, a period of record with a lower average annual flow estimates that the amount of water available at these diversion points on an average annual basis would be approximately 3,600 acre feet (N.M. Ex. F-36).

2. New Mexico appropriators

The following is a list of the New Mexico water appropriators and their actual water usage as revealed by the evidence in this case.

Name	Acres Actually Irrigated (if applicable)	Amount of Water	Transcript or Exhibit Reference
Vermejo Park Corporation	250	500 a.f.	(Charlesworth) Tr. 2068, 2097
Kaiser	Not applicable	361 (max.usage)	(Taylor) Tr. 1738
Phelps-Dodge	150	300	(Davis) Tr. 2163
Duell-Messick	48.4	96.8	(Compton) Tr. 1029
Pompeo	50	100	(Pompeo) Tr. 2201
Ray Porter	14	28	(Porter) Tr. 2189
Vermejo Park Corporation[7]	46.73	93.46	(Charlesworth) Tr. 2110
Odom	113	226	(Odom) Tr. 2213
Vermejo Conservancy District	4,379 (Av. acres irrigated)	14,535[8] (25-yr. average)	N.M. Ex. F-37 and Colo. Ex. 71

[7]The Vermejo Park Corporation has this small acreage between the Vermejo Conservancy District headgate and its reservoirs as well as the acreage just below the state line.

[8]This includes water from both the Vermejo and the Chico Rico.

Proceeding down the river from the state line, the first water user is the Vermejo Park Corporation, which according to its testimony irrigates approximately 230-250 acres of hay land from the Vermejo (Tr. 2068, 2097). The land irrigated is in the vicinity of the hunting and fishing lodges (Tr. 2109). Vermejo Park Corporation is a subsidiary of Pennzoil Corporation and holds the Vermejo Park property primarily for recreational hunting and fishing rather than raising hay (Tr. 2064-67, 2108, 2109). The cattle operation also involves lands on the Cimarron River where there is considerably more water and more hay production than on the Vermejo (Charlesworth Dep. 623; Tr. 2109). The Cimarron River is in a different watershed.

The next user downstream is Kaiser Steel Corporation, which operates a coal mine in York Canyon and uses the water primarily for coal washing, dust suppression and land reclamation (Tr. 1724, 1725, 1738). Kaiser acquired water for this operation from two sources. It purchased water rights formerly owned by a man named Messick in the amount of 230 acre feet, being the water allocable to 115 acres of irrigation (N.M. Exs. G-13, G-14). As indicated by Colorado Exhibits 49 and 6, page 6, these Messick rights had not been used for many years. The other source of the Kaiser water is a lease from Phelps-Dodge Corporation of 400 acre feet of water, being that amount allocable to 200 acres under the Phelps-Dodge claimed right (Colo. Ex. 51). The New Mexico Brief at page 27 states that this lease was entered into by Phelps-Dodge to avoid the possibility of forfeiture of the right.

The Kaiser use is a new use which commenced in recent years with the opening of the new mine (Tr. 1105, 2437). The total amount of water Kaiser acquired by purchase and lease was 630 acre feet per year. However, Kaiser's witness, Mr. Taylor (Tr. 1727), indicated uncertainty as to whether they would increase their operation beyond its current size. The present operation

has used no more than 361 acre feet, and that was in 1976 (Colo. Ex. 6, Tbl. 1; Tr. 1725). Since then the use has actually decreased (Colo. Ex. 6, Tbl. 2).

The next appropriation down the river is the Phelps-Dodge Corporation, which holds the senior water right on the Vermejo River in New Mexico. Its point of diversion is situated just below the Dawson gauge. For several years, Phelps-Dodge has leased certain of its land and the water available under its water right to the C. S. Springer Cattle Company, which has irrigated no more than 150 acres (Colo. Ex. 6, pp. 6-7; Tr. 2163). Mr. Spencer, the general manager of the Vermejo Conservancy District, testified that he did not think Phelps-Dodge or its lessee had irrigated more than 80 acres (Knox Dep., p. 54; Colo. Ex. 6, pp. 6-7).

The most significant depletions of the river flow between the state line and Vermejo Conservancy District are caused by water detention dams, fishponds and stockponds. These impoundments, each one of which is fairly small, have a significant effect on the flow of the river and are said to be the primary cause of the water shortage in the Vermejo Conservancy District (Colo. Exs. 37, 38, 40, 43, 44, 45, 48). Stockwater ponds of 10 acre feet or less are not administered by New Mexico officials, are not limited in number, and are not subject to the doctrine of prior appropriation in New Mexico. §72-9-3 NMSA 1978.

The last diversion point on the Vermejo River is that of the Vermejo Conservancy District, which has a diversion structure capable of diverting 600 cubic feet per second (Tr. 1414).[9] The District distribution system

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[9]That structure is capable of diverting the entire flow of the Vermejo River just below the Dawson gauge some 99.9% of the time during the period of record (N.M. Exs. F-18; D-1, p. 23). Little water in the Vermejo passes this diversion point.

consists of over 70 miles of canals and laterals and a reservoir system which was largely rehabilitated under a reclamation project commenced in the early 1950's (Colo. Ex. 36). However, before the water gets to the first reservoir of the Vermejo Conservancy District, there are diversions in small amounts by individual users whose rights are senior to those of the District (Colo. Ex. 25). Those amounts are shown above in the tabulation.

The history of the Vermejo Conservancy District is one of continuous problems, uncertainties and highly questionable justification. It started out being described as a "rescue project" by President Truman when he signed the authorizing legislation and loan (Tr. 1560). It has paid virtually nothing on the principal and no interest on this indebtedness (Tr. 1557; Colo. Ex. 46). The District is limited by agreement with the federal government to irrigate no more than 7,379 acres, approximately one-half of its decreed rights (Colo. Ex. 19, 25, 33). In no year during the history of the District has all of this 7,379 acres been irrigated (N.M. Ex. F-37). The efficiency of the District system is 32.7% to the farm headgate and 24.6% to the crops (Colo. Exs. 70, 71).[10] New Mexico's chief witness, Mr. Mutz, discussed the District water system losses in detail (Tr. 1280, 1285, 1286, 1297, 1315, 1318).

Of great importance to this case is the more than 2,000 acre feet of water which is released annually by the District from its reservoirs for stockwatering. This stockwater could be supplied through a closed system, which would use less than 100 acre feet of Vermejo water per year (N.M. Ex. E-3). State and federal grants and loans are available to finance such a closed system. A savings of some 2,000 acre feet, currently lost through the present open ditch stockwatering system, would result (N.M. Ex.

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[10]This means that 67.3% and 75.4% of the water diverted from the river is lost between the diversion from the river, through the reservoirs and canals, and the farm headgate and the fields, respectively.

E-3, pp. 2, 18; Colo. Exs. 69 and 70). Colorado demonstrated, using New Mexico's own figures, that this saving would virtually offset any effect the Colorado diversion might have on the District in critical dry periods (Colo. Exs. 69 and 70).

D. Chico Rico system

In concluding this discussion of the Vermejo River system for the purpose of this case, it is important to give a brief picture of the Chico Rico system since it contributes a significant amount of water to the Vermejo Conservancy District. Mr. Mutz, New Mexico's chief witness, indicated in his testimony (Tr. 1303) that the Chico Rico contribution to the District water supply is approximately 30%. The Chico Rico, like the Vermejo, originates in Colorado, which contributes a major part of its flow (Tr. 1564). Its location is east of the Vermejo. A Bureau report (Colo. Ex. 40) indicates that the Chico Rico at times may well be a more important source of water to the District than the Vermejo. Included in the Chico Rico system are three creeks, Willow, Curtis and Crow, which involve only small amounts of water.

The testimony indicated that there was only one claimant for Chico Rico water below the Vermejo Conservancy District canal, the Red River Irrigation Company. The New Mexico officials do not know how many times water is passed to this company or how many acres are irrigated by it. In short, there is no administration of water rights on the Chico Rico (Tr. 1066, 1114, 1115, 1116).

Although Colorado, as indicated, contributes a significant amount of water to the Chico Rico, it is claiming none of that water in this proceeding.

III. SUMMARY OF THE ARGUMENT

Equitable apportionment of interstate waters involves a consideration of many factors. Such cases involve substantial interests of quasi-sovereign states in a necessity of life. Time and again the Supreme Court has rejected a rigid adherence to any particular legal doctrine, always attempting to achieve an "equitable apportionment" in light of the facts. In no equitable apportionment proceeding wherein water was available to both states (or in any interstate compact) has a state been allowed to divert the entire flow of an interstate stream, thereby denying the right of the other state to make diversions from that stream.

The Special Master conducted an extensive trial, involving a great deal of testimony and numerous exhibits. Exhaustive briefs were submitted in support of each state's case. Upon consideration of all of these matters, the Special Master recommended that Colorado be allowed to divert 4,000 acre feet per year from the Vermejo River system, leaving much more than that for New Mexico. His recommendation is based upon the factual conclusion that Colorado's diversion would not materially injure the New Mexico uses, upon a balancing of the equities which show that the injury, if any, to New Mexico would be offset by the benefit to Colorado and upon countervailing equities in Colorado. His recommendation and conclusions, especially in light of New Mexico's ability to prevent any injury to its users through reasonable conservation measures, are equitable to both states and are supported by the evidence in the record.

IV. THE SPECIAL MASTER PROPERLY ANALYZED AND APPLIED THE LAW OF EQUITABLE APPORTIONMENT

A. New Mexico's legal argument is reducible to the contention that priority of appropriation

is the only factor to be considered in an equitable apportionment.

New Mexico acknowledges on the opening page of its Brief that the instant proceeding "is an action in which the State of Colorado seeks an 'equitable apportionment' of the Vermejo River." (N.M. Br., p.1.) Yet, New Mexico's legal argument in support of its exceptions to the Special Master's Report simply attempts to equate the legal principles in this case to the rules which govern the rights of private appropriators in New Mexico. This position misunderstands the nature of equitable apportionment.

New Mexico's legal theory may be fairly summarized by the following quotations from its Brief:

> In this case all of the factors which create equities that have been recognized in equitable apportionment litigation are in New Mexico. Because Colorado has never applied the water of the Vermejo River to beneficial use, she possesses no equities with which to justify an award of 4,000 acre-feet per annum.

N.M. Br., pp. 9-10.

> Priority of appropriation is not a mere factor in settling interstate water disputes — it is the paramount basis of decision, to be modified or varied to protect existing economies as the facts of each case warrant.

N.M. Br., p. 2.

New Mexico argues there can be only one equity worthy of consideration: the relative priorities of the parties in their appropriation of water from the Vermejo River. New Mexico also seems to assert that no equitable apportionment has ever awarded water to one state to the detri-

ment of another state's existing economy. The cases are contrary to both assertions. New Mexico, in effect, argues for a hard and fast rule of law rather than a weighing of equities.

While the Special Master gave due consideration to the fact that priority of appropriation is a guiding factor to be considered in an action of this nature (Report, p. 22), he also evaluated the other factors enumerated in previous equitable apportionment decisions. To the extent that New Mexico contends the Special Master did not treat this case as one arising under and governed solely by the doctrine of prior appropriation, it is correct. To the extent that New Mexico claims the Special Master erred in that regard, it has no support in the law of equitable apportionment.

B. An equitable apportionment calls for the exercise of an informed judgment which is based on a consideration of many factors.

Two basic systems govern the allocation of water in the United States: the riparian system and the prior appropriation system. The doctrine of equitable apportionment is a separate specialized body of law applicable only to disputes between states over the right to divert water from an interstate stream. *Kansas v. Colorado*, 206 U.S. 46 (1907). As its very name implies, "equitable apportionment" is an equitable doctrine, an attempt to apportion waters between states in a fair and reasonable manner.

New Mexico contends the only fair apportionment in this case would be to give New Mexico all of the water in the Vermejo River. The Special Master, upon consideration of all relevant factors, determined that it would be equitable to allow Colorado to divert up to 4,000 acre feet per year from the waters it produces for the Vermejo River; less than one-half of Colorado's annual contribution to the River (Colo. Ex. 5). New Mexico was

awarded the remainder of Colorado's production in the Vermejo system and all of the water which it contributes to the Vermejo River (Colo. Ex. 5, Tbl. 7). Colorado believes that such a division is fair, takes into account the legitimate needs and equities of the two states, and is supported by the prior decisions of this Court.

The body of law pertaining to equitable apportionment is not extensive, consisting of but seven cases (not including subsequent decisions relating to the basic cases). In chronologic order, they are: *Kansas v. Colorado*, 206 U.S. 46 (1907); *Wyoming v. Colorado*, 259 U.S. 419 (1922); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931); *New Jersey v. New York*, 283 U.S. 336 (1931); *Washington v. Oregon*, 297 U.S. 517 (1936); *Colorado v. Kansas*, 320 U.S. 383 (1943); *Nebraska v. Wyoming*, 325 U.S. 589 (1945). *Arizona v. California*, 373 U.S. 546 (1963), as the Special Master notes at page 22 of his Report, involved primarily an interpretation of the Boulder Canyon Project Act, 43 U.S.C. §§617-617t (1976), and was "not controlled by the doctrine of equitable apportionment or by the Colorado River Compact." 373 U.S. at 565.

The equitable apportionment decisions establish that priority of appropriation is an important consideration, but is not dispositive of the competing rights of states to the waters of an interstate stream. The oft-quoted passage from *Nebraska v. Wyoming*, cited by the Special Master at page 20 of his Report, is of great significance to the case at bar:

> But if an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible. For example, the economy of a region may have been established on the basis of junior appropriations. So far as possible, those established uses should be protected, though strict application of the priority

> rule might jeopardize them. Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in several sections of the River, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former — these are all relevant factors. They are merely an illustrative, not an exhaustive, catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made.

325 U.S. at 618.

The resolution of conflicting priorities in *Nebraska v. Wyoming* is instructive in the case at bar. Nebraska had filed an action against Wyoming, in which Colorado was impleaded as a defendant, alleging that Colorado and Wyoming, by diversions from the North Platte River, were violating the rule of priority of appropriation in force in the three states and depriving Nebraska of water to which she was equitably and legally entitled.

The Special Master in that case estimated that Colorado appropriators junior to the Pathfinder Project in Nebraska consumed about 30,000 acre feet a year. Since the Pathfinder Project, after 1930, had never received the full amount of its decreed rights and had always been in need of water for storage, the Special Master found, and the Supreme Court agreed, that those Colorado junior appropriations caused "present injury" to downstream users with senior rights in Nebraska and Wyoming. 325 U.S. at 601, 609. That Colorado's uses were in respects junior, and that allocation of water to those junior uses caused "present injury" to downstream seniors and their

existing economies, did not, however, warrant a reduction in those decreed Colorado rights. 325 U.S. at 621. Out-of-priority, junior appropriations were permitted in Colorado even though these appropriations limited and detracted from the amount of water available to satisfy downstream senior rights.

Similarly, the allocation between Wyoming and Nebraska, on the basis of a 25/75% division of the river's flow, respectively, gave each state water to which it would not have been entitled under the priority system. 325 U.S. at 638, 642, 643. Thus, the actual allocation of water from the North Platte River contradicts New Mexico's statement at page 15 of its Brief that, "Priority was strictly applied between Wyoming and Nebraska [in *Nebraska v. Wyoming*]."

What is shown by the result in *Nebraska v. Wyoming*, and in the other equitable apportionment decisions, is that hard and fast rules of allocation are inappropriate. Absolute protection of existing economies, even senior existing economies, did not occur in that case. Each case must be decided on the basis of the particular facts and equities involved.

The first equitable apportionment case — and still of major importance — was *Kansas v. Colorado*, 206 U.S. 46 (1907). That was a proceeding in which the State of Kansas alleged that diversions in Colorado diminished the natural flow of the Arkansas River through Kansas, thereby threatening the vested rights of Kansas' users. The relief sought by Kansas was a decree enjoining irrigation by Colorado in the Arkansas Valley and allowing the Arkansas River to flow undiminished into Kansas.

Kansas v. Colorado provides useful reference for the Master's decision in this case. Like New Mexico, Kansas contended that it was entitled to the natural flow of an

interstate stream, unbridled by upstream diversions in Colorado. Kansas (like New Mexico) argued as the basis of its case that Colorado's diversions caused injury to established Kansas water rights.

Notwithstanding the injury to water rights and existing economies in Kansas, the United States Supreme Court dismissed the bill filed by Kansas stating:

> [W]hile the influence of such diminution [by Colorado] has been of perceptible injury to portions of the Arkansas Valley in Kansas, particularly those portions closest to the Colorado line, yet to the great body of the Valley it has worked little, if any, detriment, *and regarding the interests of both States and the right of each to receive benefit through irrigation and in any other manner from the waters of this stream,* we are not satisfied that Kansas has made out a case entitling it to a decree.

206 U.S. at 117 (emphasis added).

In a preceding passage, the Supreme Court also noted:

> [T]he diminution of the flow of water in the river by the irrigation of Colorado has worked some detriment to the southwestern part of Kansas, and yet when we compare the amount of this detriment with the great benefit which has obviously resulted to the counties in Colorado, it would seem that equality of right and equity between the two States forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation.

206 U.S. at 113-114.

In *Kansas v. Colorado,* the Court considered the relative benefits and detriments to each state, without strict

regard for the relative priorities of the users in each state. *See also Nebraska v. Wyoming*, 325 U.S. at 618. Colorado submits that the Special Master in the case at bar did precisely the same, determining that "any damages to New Mexico must be weighed against benefits which will accrue to Colorado" and further that the "injury, if any [to New Mexico], will be more than offset by the benefit to Colorado." (Report, pp. 17, 23.)

In the second equitable apportionment case, *Wyoming v. Colorado*, 259 U.S. 419 (1922), the United States Supreme Court refused to allocate water strictly on the basis of priority of appropriation, as New Mexico here argues. That case involved a suit brought by Wyoming against Colorado and two Colorado corporations over the use of the Laramie River.

A perceptive and thorough explanation of the Court's ruling in *Wyoming v. Colorado* is found in the New Mexico Brief filed in *Arizona v. California*, 373 U.S. 546 (1963), attached to Colorado's Brief in Opposition to Defendant's Motion for Summary Judgment as it was filed with the Special Master in the case at bar. Colorado recommends the following discussion to the Court's attention:

> The Court first determined the dependable supply available. It then determined the quantity needed for the senior Wyoming uses and subtracted this figure from the dependable supply. Colorado was enjoined from diverting more than this balance for the use of the junior Colorado appropriator, and thus the Court made a specific allotment of water for the junior appropriator, which would constitute a firm supply for this right. This is irrespective of the senior claims in Wyoming. *The decree did not protect the senior appropriator in time of shortage as would be the case if strict priority were applied. The Court did not follow the*

application of priority regardless of state line on the basis of the natural flow of the stream. Further, the Court placed the burden of providing the storage upon the senior appropriator by the following language:

> "But Wyoming takes the position that she should not be required to provide storage facilities in order that Colorado may obtain a larger amount of water from the common supply than otherwise would be possible. In a sense this is true; but not to the extent of requiring the lowest natural flow to be taken as the test of available supply. The question here is not what one State should do for another, but how each should exercise her relative rights in the water of this interstate stream. Both subscribe to the doctrine of appropriation, and by that doctrine rights to water are measured by what is reasonably required and applied. *Both States recognize that conservation within practical limits is essential in order that needless waste may be prevented and the largest feasible use may be secured.* This comports with the all-prevailing spirit of the doctrine of appropriation and takes appropriate heed of the natural necessities out of which it arose. *We think that the doctrine lays on each of the States a duty to exercise her right reasonably and in a manner calculated to conserve the common supply.*" 259 U.S. at 484.

New Mexico Brief in *Arizona*, pages 18-19 (emphasis added).

In its Brief in *Arizona*, New Mexico aptly pointed out two major features of the decision in *Wyoming v. Colorado:*

Priority of appropriation must be considered in light of countervailing equities. Each state has a duty to do its best to "conserve the common supply," whether by providing storage, eliminating waste, or otherwise; a fact which Colorado has urged throughout this lawsuit (*see* Colorado Post Hearing Brief). As New Mexico itself stated:

> It seems to the state of New Mexico that the cases all point to the conclusion that the doctrine of equitable apportionment contains many, many factors, of which priority is but one. To blindly follow this principle [of priority of appropriation] at the expense of the many factors is to urge a technical rule which is totally out of keeping with the spirit of the concept of determination of the equitable share of the benefit of an interstate stream system. These cases demonstrate that in this type of dispute the Court will not be encumbered by any technical rules in finding a reasonable solution to a particular problem.

New Mexico Brief in *Arizona*, pp. 32-33.

Even in *Wyoming v. Colorado*, the equitable apportionment case wherein the priority doctrine was most closely followed, other equities including waste, ability to conserve, and storage, bore upon the ultimate apportionment. The decision did not prohibit a transmountain diversion in Colorado for a new use. The Special Master in the case at bar heard the evidence and considered the various facts.[11] He did not blindly follow the priority system, the avenue rejected by New Mexico in *Arizona v. California*, but urged by New Mexico here. His approach was consistent with, and required by, prior case law.

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[11]The Special Master as attorney general of Wyoming actually participated in one phase of that case, *Wyoming v. Colorado*, 309 U.S. 572 (1940) (Tr. 581-82.)

The conspicuous omission in the New Mexico Brief of any reference whatsoever to two of the equitable apportionment cases underscores the weakness of its position. The only possible explanation of why New Mexico makes no mention of *Connecticut v. Massachusetts*, 282 U.S. 660 (1931) or *New Jersey v. New York*, 283 U.S. 336 (1931), is that each decision is persuasive authority that water may be allocated to a state in an equitable apportionment proceeding for a new use, where there is no present use of the water.[12]

In *Connecticut v. Massachusetts*, for example, the State of Connecticut sought to restrain diversions from the Connecticut River which would provide water for the future growth of Boston and neighboring cities. As it had done in *Kansas v. Colorado* and *Wyoming v. Colorado*, the Court unconditionally rejected the notion that the determination of the relative rights of contending states in respect to the use of streams flowing through them is governed by the same rules of law that are applied within each of those states. *Connecticut v. Massachusetts*, 282 U.S. at 670. Division of an interstate stream depends "upon a consideration of the pertinent laws of the contending states and all other relevant facts [which] will determine what is an equitable apportionment of the use of such waters." 282 U.S. at 670-671.

Massachusetts proposed to accomplish a diversion which it had never before made, one for future uses in the Boston area. Although Connecticut complained of injury, the Court nonetheless permitted the diversion, emphasizing that due consideration must be given "all relevant facts." The water allocated to Colorado by the Master in the case at bar is water produced in Colorado

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[12]New Mexico argues against "future uses" in Colorado on the one hand, and at the same time urges that Vermejo Park Corporation, Kaiser Steel Corporation and Phelps-Dodge Corporation be allowed to expand their present usage of Vermejo water for future requirements.

and water which will aid the existing economy in Colorado's Purgatoire Valley.

New Jersey v. New York, 283 U.S. 336 (1931), was the next equitable apportionment suit. In that case the State of New Jersey sued the State of New York and the City of New York to enjoin them from diverting water from non-navigable tributaries of the Delaware River for the purpose of increasing the water supply of the City. Importantly, that case involved a future, proposed use of Delaware River water in another watershed, the Hudson River. New Jersey's arguments were, predictably, that it was already using the water which New York wanted, and in any event, there was not enough water to go around. Initially, the Court rejected a rigid application of the riparian doctrine. Citing western apportionment suits, particularly *Wyoming v. Colorado*, the Court, speaking through Mr. Justice Holmes, stated, "[T]he effort always is to secure an equitable apportionment without quibbling over formulas." 283 U.S. at 343.

The Master in *New Jersey v. New York* recommended to the Supreme Court an apportionment quite similar to the result which the State of Colorado here urges. While New Jersey claimed (through prior use) the right to the entire flow of the Delaware River, the Master allocated a substantial quantity of water to the State of New York and the City of New York. Looking not at who used the water first, but at how use in both states might be accomplished without grave injury to either, the Master allotted to New York a portion of water which would benefit New York without substantially impairing rights in New Jersey. As in *Connecticut v. Massachusetts*, the Court permitted a diversion by New York, even though no prior use existed. It announced the following controlling principle:

> [The river] offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the

> water within its jurisdiction. But clearly the exercise of such power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the River might come down to it undiminished. *Both States have real and substantial interests in the River that must be reconciled as best they may be.*

283 U.S. at 342 (emphasis added).

The Special Master's ruling in the case before the Court reconciles the "real and substantial interests" which both Colorado and New Mexico enjoy in the Vermejo River and acknowledges that neither state may command the total flow of the river.

The obvious reason why New Mexico ignores *Connecticut v. Massachusetts* and *New Jersey v. New York*, is that each case provides specific support for the Special Master's legal conclusions. If, upon consideration of all relevant facts, it is determined that an allocation of water for a new use is fair and equitable, that allocation is proper and will be sustained.

New Mexico's argument against Colorado's diversion because it involves a "future use" is ironic. Colorado has an existing economy with a present need and plan of use for the water. New Mexico, on the other hand, urges that it be permitted the entire flow of the river so that entities such as Kaiser Steel and the Vermejo Park Corporation can expand their present use of Vermejo water at some undetermined time in the future, and that the Vermejo Conservancy District can continue its wasteful use of water.

The second equitable apportionment case between Colorado and Kansas is also instructive. The decision in

Colorado v. Kansas, 320 U.S. 383 (1943), shows again that the concept of prior use will not necessarily be determinative when there are other countervailing equities. The second action was instituted by Colorado to prevent Kansas users from continuing pending suits against Colorado users, or from commencing further actions. Kansas again sought an equitable apportionment of the Arkansas River, claiming Colorado had increased its diversions to the material injury of Kansas users.

The suit was resolved in much the same way as *Kansas v. Colorado*. Initially, the Court granted Colorado's request that Kansas and its users be enjoined from bringing further suits against Colorado or its users to prevent diversions from the Arkansas River. As to Kansas' renewed request for an equitable apportionment of the Arkansas River, the Court, for a second time, denied the request on the ground that Kansas had failed to sustain its allegations that Colorado's uses "worked a serious detriment to the substantial interests of Kansas." 320 U.S. at 400.

While the case essentially follows the ruling in *Kansas v. Colorado*, its reemphasis of several points is noteworthy. As to Colorado's basic right to divert water from the Arkansas River, the Court repeated, "The lower State [Kansas] is not entitled to have the stream flow as it would be in nature *regardless of need or use*." 320 U.S. at 393 (emphasis added). *Accord, Kansas v. Colorado*, 206 U.S. 85, 101-102; *Connecticut v. Massachusetts*, 282 U.S. 660, 669-670; *Washington v. Oregon*, 297 U.S. 517, 523, 526. In other words, each state has a substantial claim to a portion of the flow of an interstate river, the real question being the amount of each state's entitlement.

New Mexico places great emphasis upon the ruling in *Washington v. Oregon*, 297 U.S. 517 (1936). As the Special Master notes, that case was one in which it was not clear that the disputed water would ever reach the

Washington users if an allocation of water to Washington were made. The case involved a situation where Oregon was allowed to divert the entire flow of a small river, the Tum-a-lum. The reason for that ruling was the fact that Washington's demand for water from the Tum-a-lum involved a "futile call."[13] In the words of the Special Master in *Washington v. Oregon:*

> There is no satisfactory proof that to turn down water past the Red Bridge in Oregon during the period of water shortage would be materially more advantageous to Washington users than to permit such water to be applied to surface irrigation in Oregon.

297 U.S. at 522.

The Supreme Court explained as follows:

> This is so because of the nature of the channel of the Tum-a-lum River. During the period of water shortage, only a small quantity of water would go by if the dams [on the Tum-a-lum] should be removed. There is evidence that this quantity, small at the beginning, would be quickly absorbed and lost in the deep gravel beneath the channel.

297 U.S. at 522-23.

Water passed by Oregon users would not have reached Washington. Thus, there is considerable doubt that the Tum-a-lum was even an interstate stream subject to equitable apportionment. New Mexico's reliance on this case is misplaced. Its argument that Colorado, like Washington, is guilty of laches also misses the mark. The

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[13] "Futile call" is a term used in western water parlance to denote a situation in which water would not reach the person calling for it even if an upstream diversion were curtailed.

Washington users failed to exercise their decreed rights for over 30 years before asserting them against Oregon's users. Colorado's rights are recent, and an attempt to exercise them has been made since their inception.

New Mexico argues that the Special Master's discussion of *Arizona v. California* is the "most incomprehensible portion" of his Report. (N.M. Br., p. 16). The Special Master's Report is consistent with the ruling of the Court in that case, in that the division of the waters of the Colorado River turned upon an interpretation of the Boulder Canyon Project Act. What is difficult to understand is New Mexico's contention that the Gila River dispute provides legal precedent for the case at bar, when that dispute was settled out of court by compromise of the parties, and not by decision of the Supreme Court. 373 U.S. at 594.

While *Arizona v. California* is not an equitable apportionment case, portions of the opinion are relevant to the case at hand. The problem facing the Court in *Arizona v. California* was how to divide 7,500,000 acre feet of water annually between the lower basin states: California, Arizona and Nevada. The Colorado River Compact allocated that amount to the states, but failed to divide the lower basin states' share of the Colorado River water between them. Of fundamental concern to Arizona and Nevada was the possibility that by prior appropriation, California might acquire rights to most of the Colorado River, leaving Arizona and Nevada but a miserly share. The Supreme Court explained:

> Failure of the Compact to determine each State's share of the water left Nevada and Arizona with their fears that the law of prior appropriation would be not a protection but a menace because California could use that law to get for herself the lion's share of the waters allotted to the Lower Basin.

373 U.S. at 558.

This was a concern which was originally brought to life in the upper basin states when the possibility of storage and canal projects raised the spectre that California might appropriate the additional water made available by these projects. 373 U.S. at 555.[14] Thus, one of the underlying concerns for both the Colorado River Compact and the Boulder Canyon Project Act was that the law of prior appropriation would deprive other states of water and their ability to develop local economies.

The case was decided in part on the factors mentioned above, in part upon a compromise settlement between New Mexico and Arizona over conflicting claims on the Gila River, and in part on the doctrine of reserved rights.[15] 373 U.S. at 546-590, 594-595, 598-601. Interestingly, none of these divisions involved a strict application of the prior appropriation doctrine.

A composite of the various equitable apportionment cases shows that the Special Master properly rejected New Mexico's contention that priority of appropriation is the paramount (only) consideration in an equitable apportionment action and demonstrates the propriety of the Special Master's equitable approach:

A. One state will not be permitted to command the entire flow of an interstate stream "regardless of need or use." *Kansas v. Colorado*, 206 U.S. 46, 85, 101-102; *Connecticut v. Massachusetts*, 282 U.S. 660, 669-670; *New Jersey v. New York*, 283 U.S. 336, 342; *Washington v.*

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[14]The New Mexico State Engineer, Mr. Reynolds, emphasized in his testimony that a prime consideration underlying the Colorado River Compact was the desire of the upper basin states to protect themselves, lest the priority of appropriation doctrine allow California to appropriate the entire remaining flow of the Colorado River (Tr. 2382-83).

[15]The Court also allocated water for future uses in Arizona, California and Mexico pursuant to the intent of Article III(A) and (B) of the Boulder Canyon Project Act. 373 U.S. at 555, 561-562.

Oregon, 297 U.S. 517, 523, 526; *Colorado v. Kansas*, 320 U.S. 383, 393.

B. While priority of appropriation is a consideration, water can be apportioned to junior priorities even if such apportionment injures existing economies and senior priorities. *Kansas v. Colorado*, 206 U.S. 46, 113-114; *Wyoming v. Colorado*, 259 U.S. 419, 484; *Connecticut v. Massachusetts*, 282 U.S. 660; *Nebraska v. Wyoming*, 325 U.S. 621, 642-643.

C. Each state bordering an interstate stream must exercise her rights in an interstate stream reasonably and institute conservation or storage practices to conserve the common supply. *Wyoming v. Colorado*, 259 U.S. 419, 484; *Nebraska v. Wyoming*, 325 U.S. 589, 618.

D. The law governing disputes between states is not the same as the law which governs the resolution of disputes between private citizens. *Kansas v. Colorado*, 185 U.S. 125, 136; *Connecticut v. Massachusetts*, 282 U.S. 660, 670; *New Jersey v. New York*, 283 U.S. 336, 343.

E. A state may divert water from an interstate stream even if it has not done so previously. *Connecticut v. Massachusetts*, 282 U.S. 660; *New Jersey v. New York*, 283 U.S. 336.

F. Priority of appropriation is but one of many considerations in an equitable apportionment proceeding. *Wyoming v. Colorado*, 259 U.S. 419; *Nebraska v. Wyoming*, 325 U.S. 589, 622.

G. Physical conditions of the river, consumptive use, return flows, and other "countervailing equities" or "exigencies" which a state may present must be considered. *Nebraska v. Wyoming*, 325 U.S. 589, 622; *Kansas v. Colorado*, 206 U.S. 46, 113-114; *Connecticut v. Massachusetts*, 282 U.S. 660, 670. In short, the law of equitable

apportionment requires consideration of all equitable factors.

C. New Mexico did not satisfy the burden of proof it bears to sustain a ruling in its favor.

Though Colorado is the plaintiff in this action, New Mexico bears the burden of demonstrating that Colorado diversions would work a serious injury to the substantial interests of New Mexico and its citizens.[16] Notwithstanding the nominal standing of the parties as plaintiffs or defendants in equitable apportionment cases, the decisions in those cases uniformly place the burden on the *downstream* state to show by clear and convincing proof that diversions in an upstream state would cause serious injury to the substantial interests of the lower state and its citizens. *E.g., Kansas v. Colorado,* 206 U.S. at 117; *Connecticut v. Massachusetts,* 282 U.S. at 669; *Colorado v. Kansas,* 320 U.S. at 393-394.

The Supreme Court's statement of issues in *Colorado v. Kansas* establishes that the burden of proof remains on the downstream state — the state seeking to enjoin diversions in another state — regardless of which state was plaintiff: "(1) Is Colorado entitled to an injunction against the further prosecution of litigation by Kansas users against Colorado users? (2) Does the situation call for allocation of the waters of the basin between Colorado and Kansas in second feet or acre feet? (3) Has Kansas proved that Colorado has substantially and injuriously aggravated conditions which existed at the time of her earlier suit?" *Id.* at 389-390.

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[16]Colorado has been forced to appear in this action as the plaintiff because of litigation in the United States District Court for the District of New Mexico in which an injunction was issued against diversions of Vermejo River water in Colorado. *Kaiser Steel Corporation v. CF&I Steel Corporation,* No. 76-244, United States District Court, Dist. N.M. (1976). *See* Colorado's Order for Appearance, Motion for Leave to File Complaint, and Statement of Facts and Brief in Support of Motion for Leave to File Complaint in the case at bar.

The Court placed the burden on Kansas to demonstrate serious injury to its interests, stating, "The *lower state is not entitled* to have the stream flow as it would regardless of need or use." 320 U.S. at 393 (emphasis added). The Court held that Kansas had not satisfied its burden of proving that Colorado's use had worked a serious detriment to the substantial interests of Kansas, and refused to enjoin the upstream uses. 320 U.S. at 400.

The controlling factor in allocating the burden of proof is not which state is the plaintiff in an equitable apportionment action; the burden is always on the downstream state to show that a junior use in an upstream state would work a serious injury to the interests of the downstream state and its citizens. In his Report, the Special Master concluded:

> It is the opinion of the Master that a transmountain diversion would not materially affect the appropriations granted by New Mexico for users downstream. A thorough examination of the existing economies in New Mexico convinces the Master that the injury to New Mexico, if any, will be more than offset by the benefit to Colorado.

Report, p. 23.

Thus, as the Special Master's conclusions demonstrate, New Mexico has not shown by necessary evidence that Colorado's diversion would "materially affect" the New Mexico uses, or that it is entitled to enjoin Colorado's uses.

D. New Mexico's position conflicts directly with concepts inherent to interstate compacts and with the law of equitable apportionment.

Equitable apportionment may be achieved either through interstate compact or through decision of the

United States Supreme Court. In either case, the priorities or the riparian rights in the particular states adjust to apportionment. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). In no equitable apportionment proceeding wherein water was available to both states or in any interstate compact has any state been permitted to divert the entire flow of an interstate stream.

Dr. Jeris Danielson, the State Engineer of the State of Colorado, testified at length regarding the interstate compacts to which Colorado is a party. He explained that pursuant to a number of those compacts, senior priorities in Colorado are curtailed to satisfy its obligations to a neighboring state in which the water rights are junior. He stated (Tr. 519) that under the Rio Grande Compact involving Texas, New Mexico and Colorado, it is often necessary "to curtail water users on the Conejos River [in Colorado] with priorities as early as 1851 in order to meet Colorado's obligation under the 1938 compact at the state line gauge between Colorado and New Mexico." Under the South Platte River Compact between Nebraska and Colorado, senior rights in Colorado may have to be curtailed to meet obligations to Nebraska (Tr. 542, 543). Under the Republican River Compact between Nebraska and Colorado each state is given a certain amount of water without regard "to priorities, or to delivery obligations." (Tr. 548). The Arkansas River Compact between Kansas and Colorado also involves an allocation of a certain amount of water to each state from storage in a particular reservoir without "administration on a priority basis per se interstate." (Tr. 549,550).

Dr. Danielson discussed at length the Colorado River Compact involving California, Arizona and Nevada, as the lower basin states, and Wyoming, Colorado, Utah and New Mexico as the upper basin states. Under this compact, each upper basin state is "allocated a percentage of the upper basin's share of water." Colorado "must guarantee to the state of Utah a flow of 5,000,000 acre feet

of water in the Yampa River . . . without regard to the priorities." (Tr. 558). Referring to the Colorado River Compact, he stated that "the net result of the compact, as I stated, was to preserve those waters to the upper basin even though they weren't using them, and generally are still not completely using them today, for future development." (Tr. 575).

On cross-examination, Dr. Danielson was asked by the New Mexico attorney if it was not "true that priority is ordinarily the most important criterion in negotiating the compact?" Dr. Danielson responded as follows:

> Well, I think if that were true across the board, Texas and southern New Mexico would not have received a drop of water out of the Rio Grande, because there was really little or no irrigation on the Rio Grande until the Elephant Butte Reservoir was built in the early 1900's.
>
> If we want to play the priority game solely, then I think Colorado could have established clearly a need for all the waters it generates in the state in the Rio Grande basin.
>
> But that is not the result because Texas, southern New Mexico and New Mexico above Elephant Butte could clearly establish they had an equitable interest in the waters of the Rio Grande. So the allocations were made, not on the basis of priority, but on the basis of what that equitable apportionment would be.

Tr. 579-80.

Mr. Reynolds, the State Engineer of the State of New Mexico, testified (Tr. 2382, 2383) that the Colorado River Compact was negotiated in 1922 because of prior and "extensive development of waters in the lower basin." He

confirmed that "New Mexico receives Colorado River system water under the San Juan-Chama Project." (Tr. 2407) He agreed that under the Rio Grande River Compact it was "probably so" that "senior rights in Colorado would be curtailed on occasion to satisfy junior rights in New Mexico." (Tr. 2409)

In connection with the San Juan-Chama Project, it would be well to point out that New Mexico's Exhibit C-5, a water study for the City of Raton, states that 3,000 acre feet of San Juan-Chama water is available for the future use of Raton. This is water which Colorado produces, and which New Mexico may allocate for some future use.

As indicated, these compacts deal with the apportionment of the waters of interstate streams on a basis of equity, with each state having rights in the stream. As indicated by the State Engineers for both New Mexico and Colorado, a major objective in certain of the compacts is to protect an upper state with respect to priorities in lower states. In other cases, upstream states are required to suspend their senior rights to supply junior rights in downstream states. Under the various interstate compacts to which Colorado is a party, and the equitable apportionment proceedings in which it has been involved, Colorado is generally obligated to deliver about half of the water that it produces (Tr. 562).

Thus, whether equitable apportionment is achieved through interstate compact or United States Supreme Court decision, the objective is to apportion the waters of an interstate stream on the basis of the equities. No case or compact involves a situation in which one state was allocated no water, as New Mexico contends for here, and most compacts and cases involve situations where priorities in particular states give way to the overall allocation accomplished through the equitable apportionment (Tr. 584); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

E. This proceeding is not barred by the Eleventh Amendment.

At every stage of this proceeding New Mexico has insisted that Colorado does not have an interest in this litigation sufficient to make the case a controversy between states and, therefore, a suit within the Supreme Court's original jurisdiction under Section 2 of Article III of the United States Constitution. And, at every stage, the argument, which has worn various disguises, has been rejected: by this Court when it gave Colorado leave to file a complaint despite New Mexico's Brief in Opposition to Motion for Leave to File Complaint; and by the Special Master with respect to New Mexico's motion made on the next to the last day of trial (Tr. 2678-2694, 2770-2785).

1. New Mexico's argument has been raised previously and rejected by this Court.

In its Brief in Opposition to Motion for Leave to File Complaint, dated October 11, 1978, the State of New Mexico raised and argued the position which it here seeks to resurrect. A cursory review of the Statement of the Case in that Brief reveals that a nearly identical argument was presented by New Mexico from the outset, and was rejected by this Court. The final paragraph at page 7 of the Brief in Opposition to Motion for Leave to File Complaint illustrates this point:

> Colorado thus comes before this Court with no existing uses and no existing equities, seeking leave to justify an "equitable apportionment" of the waters of the Vermejo River. In truth, however, Colorado seeks not an equitable apportionment. She possesses only one interest in the Vermejo waters — the paper right to CF&I. The proposed action, in reality, is nothing greater than an attempt by CF&I to enjoin long-established uses

> in New Mexico in order to make water available for contemplated uses of its own. Nominally designated an action in equitable apportionment, Colorado's proposed complaint is an effort at corporate expansion wrapped in the rhetoric of constitutional law.

This Court rejected New Mexico's argument and granted Colorado leave to file its complaint.

As the Court has previously observed, "[the] requirement of a motion for leave to file a complaint, and the requirement of a brief in opposition, permit and enable us to dispose of matters at a preliminary stage." *Ohio v. Kentucky*, 410 U.S. 642, 644 (1973). These procedural prerequisites facilitate the Court's determination of whether its exercise of jurisdiction would be constitutionally sound. Very recently, in *Maryland v. Louisiana*, 101 S. Ct. 2114 (1981), the Court stated that "[u]sually, when we decline to exercise our original jurisdiction, we do so by denying the motion for leave to file." *Id.* at 2126 n. 16. *See, e.g., Pennsylvania v. New Jersey*, 426 U.S. 660 (1976); *Arizona v. New Mexico*, 425 U.S. 794 (1976); *Massachusetts v. Missouri*, 308 U.S. 1, 14-15 (1939); *Alabama v. Arizona*, 291 U.S. 286 (1934). *See also* Note, *The Original Jurisdiction of the United States Supreme Court*, 11 Stanford L. Rev. 665, 687 (1959). In the present case, Colorado's motion was granted. Inasmuch as this Court has effectively ruled on the jurisdictional issue, the matter has been decided and did not require the Special Master's further attention.

2. Colorado, in precisely the same manner as New Mexico, has a substantial interest in this litigation.

Waters of the natural streams in Colorado are owned by the state in trust for the people. *Wheeler v. Northern Colorado Irrigation Company*, 10 Colo. 582, 17 P. 487

(1887); *Platte Water Company v. Northern Colorado Irrigation Company*, 12 Colo. 525, 21 P. 711 (1889). The following quote from *Stockman v. Leddy*, 55 Colo. 24, 129 P. 220 (1912), conclusively demonstrates this point:

> The State [of Colorado] has never relinquished its right of ownership and claim to the waters of our natural streams, though it has granted to its citizens, upon prescribed conditions, the right to the use of such waters for beneficial purposes and within its own boundaries . . . . Such being the peculiar conditions, *the state was justified in asserting its ownership of all the natural streams within its boundaries.*

55 Colo. at 28, 29, 129 P. at 222 (emphasis added).

Accord, Colorado Constitution, Article XVI, Section 5.

A dispute "directly affecting the property rights and interests of a state" is a proper subject of litigation between states. *Missouri v. Illinois*, 180 U.S. 208, 240 (1901). A state has an inherent interest in its natural resources, which is direct enough to support a suit against another state on its own behalf and on behalf of its citizens. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) (a state has "an interest independent of and behind the titles of its citizens, in all the earth and air within its domain").

As trustee of the waters within its territory, Colorado must protect the present and future interests of the beneficiaries of this public trust, the citizens of Colorado. Colorado is by no means the first state to bring a suit to protect the rights its citizens derive from its sovereign property rights. *See, e.g., New Jersey v. New York*, 345 U.S. 369 (1953); *Kentucky v. Indiana*, 281 U.S. 163 (1930); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *Wyoming v. Colorado*, 259 U.S. 419 (1922); *Kansas v.*

Colorado, 185 U.S. 125 (1902). That New Mexico even questions Colorado's right to bring this action is somewhat remarkable. The role of a state in bringing an action to protect the rights of its citizens is as parens patriae.

A dispute involving the water rights of neighboring states is a uniquely appropriate setting for one state to claim standing as parens patriae in a suit against the neighboring state. The citizens' rights are derived from and, therefore, cannot exceed those of the state. Furthermore, a state cannot grant its citizens the use of water in which the state has no property right. *See Badgley v. City of New York*, 606 F.2d 358, 365-66 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 2989 (1980). A state's interest in water rights is "indissolubly linked with the rights of the appropriators." *Wyoming v. Colorado*, 259 U.S. 419, 468 (1922). For one state to deny the rights of the appropriators in another state is tantamount to denying the property rights of the state itself. Clearly, a state has a direct interest in the resolution of such a dispute regardless of the nature or number of private users who are directly affected.

In at least two equitable apportionment cases previously decided by the Supreme Court, *Connecticut v. Massachusetts* and *New Jersey v. New York*, the state seeking the right to divert water represented only one entity, the City of Boston and the City of New York, respectively. In *Wyoming v. Colorado*, the State of Colorado represented but three water claimants, two of which were private corporations.

Colorado represents not only the interests of CF&I, which already owns water rights on the Vermejo, but the interests of other Colorado citizens who might jointly use Vermejo water with CF&I, or who might purchase such water. The City of Trinidad and the Purgatoire River Water Conservancy District have expressed a present

interest in using water from the Vermejo (Tr. 641, 664, 674). Additionally, either of those entities, as well as any other Colorado citizen, may acquire a water right on the Vermejo in the future. The water interests of the State of Colorado include, but also transcend, any interest claimed by CF&I.

The role of parens patriae is the role asserted by every state in each previous equitable apportionment case. *See, e.g., Nebraska v. Wyoming; Arizona v. California; Kansas v. Colorado.* In every case a portion of the state's "interest" in the equitable apportionment proceeding stems from its role as parens patriae, protector of its citizens' water rights. Colorado's role differs in no manner from those roles it and other states have previously played.

None of the cases cited by New Mexico involve an equitable apportionment proceeding, or even a dispute over water or some other natural resource held by the state in trust for the people. *New Hampshire v. Louisiana,* 108 U.S. 76 (1883) (suit by New Hampshire to collect debts owed to its citizens by Louisiana); *Kansas v. United States,* 204 U.S. 331 (1907) (action by Kansas to obtain patent from United States for land owned by a railroad company and in which the state had no interest); *Oklahoma v. Cook,* 304 U.S. 387 (1938) (suit by Oklahoma on behalf of creditors of a state bank that was in liquidation). In each case the state had no interest, unlike Colorado, whose interest in the protection of its natural resources is substantial.

New Mexico's Eleventh Amendment argument cannot be accepted. If it were a valid argument, it would be practically impossible for any state ever to bring an equitable apportionment proceeding. Did Wyoming represent a sufficient number of its citizens to prosecute *Wyoming v. Colorado,* 259 U.S. 419 (1922)? Wyoming apparently felt it did. Does New Mexico represent a suffi-

ciently significant number of its citizens to legitimize its participation in this case? New Mexico apparently feels it does. Yet, in comparison to the interests represented by Nebraska or Wyoming in *Nebraska v. Wyoming*, the number or Colorado or New Mexico interests represented is small. New Mexico's numbers game is myopic, and could be contrary to the rights of its own citizens.[17]

Colorado has not "abandoned its own interest" in bringing this case (N.M. Br., p. 45). The minimum stream flow application filed by Colorado is junior in priority to the water rights owned by CF&I, and is one of literally hundreds of such applications which have been filed by the Colorado Water Conservation Board throughout the entire state. C.R.S. 1973, §§ 37-92-102, 103. The advantage of a minimum stream flow right is not so much in its priority as in the fact that it can be used to maintain the stream conditions as they were at the time of the adjudication of the minimum stream flow right. By contrast, the duty to protect the waters of the state for public appropriation is a constitutional responsibility of the State of Colorado. Colorado Constitution, Article XVI, Section 5.

New Mexico's claim that Colorado has "abandoned its own interest" and has been led by CF&I to bring this action is a serious affront to the integrity of the governor of Colorado and to the other officials involved in this case. Admittedly, it is in the interest of both the State of Colorado and CF&I Steel Corporation to obtain a favorable ruling in this case. Colorado's citizens will benefit. Likewise, had any other citizen been interested in this case, no doubt the State of Colorado would have represented his interest. The question is not what type of citizen each state represents (because the type of citizen which each state represents is nearly identical in

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[17]Actually, CF&I, a Colorado corporation employing thousands of people in southern Colorado, affects many more people than do the New Mexico entities.

this case), but rather whether Colorado has an interest in the water which it produces. The answer must be "yes."[18]

F. The doctrine of laches does not bar Colorado's claim to an equitable share of the waters of the Vermejo River.

The doctrine of laches is an equitable defense designed to encourage parties to air grievances and to vindicate rights promptly. It promotes diligence and endeavors to prevent the enforcement of stale claims. *Environmental Defense Fund v. Alexander*, 614 F.2d 474, 477-78 (5th Cir. 1980). An adverse party raising the defense must establish both that the plaintiff delayed unreasonably in seeking a remedy and that this delay caused the party undue prejudice. *Id.* at 478. The prejudice that frequently supports the defense results from such factors as the unavailability of witnesses and the loss of evidence supporting a party's position. *Tobacco Workers Local 317 v. Lorillard Corp.*, 448 F.2d 948, 949, (4th Cir. 1971).

In its attempt to invoke the doctrine of laches in this action, New Mexico has pointed to two equitable apportionment cases — *Washington v. Oregon*, 297 U.S. 517 (1936), and *Colorado v. Kansas*, 320 U.S. 383 (1943) — and has declared that laches formed the basis for the Court's denial of injunctions against actual or threatened diversions. Contrary to New Mexico's assertions, however, this Court did not base its decisions on the doctrine.

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[18]The duplicity in New Mexico's criticism of Colorado is demonstrated by its complaint that an attorney whose law firm does legal work for CF&I is a special assistant attorney general in this case when Neil Stillinger, an attorney whose law firm does work for the Vermejo Conservancy District, was a special assistant attorney general of New Mexico during the entire trial before the Special Master (Tr. 3, 4).

In *Washington v. Oregon*, a *private* claimant, the Gardena Farms District, which had a water right with a priority date of 1892, failed to claim any beneficial use of the water until 1930. 297 U.S. at 528. In other words, Washington's users failed to exercise their decreed rights for nearly 40 years. Oregon appropriators, however, had made extensive use of the water with Gardena Farms' apparent acquiescence. *Id.* Thus, the Court charged Gardena with laches and abandonment. Nothing in the opinion suggests, however, that the State of Washington lost its sovereign interest in the waters of the disputed river by virtue of its own or the Gardena Farms District's inaction. The suit was dismissed because Washington could offer no evidence of a "compensating benefit" to offset the loss that would accrue to Oregon and its appropriators. *Id.* at 523. Indeed, the evidence revealed that the water Washington sought was not likely ever to reach the State. *Id.* at 523, 529. To enjoin Oregon's diversion would have worked a needless deprivation and would have benefitted no one.

In *Colorado v. Kansas*, the State of Kansas lost its bid to enjoin Colorado's appropriators from diverting the waters of the Arkansas River. The Court noted that Kansas had not previously acted to redress the grievances it was then asserting. Indeed, the State's request for injunctive relief came in response to a complaint filed by Colorado. 320 U.S. at 394. Though the Court observed that Kansas' inaction *"might* well preclude the award of the relief" Kansas sought, *id.* (emphasis added), it did not state that Kansas' delay in challenging Colorado's conduct constituted laches sufficient to bar Kansas' claim for relief. The Court's refusal to enjoin Colorado's uses was based upon the fact that Kansas had not sustained the heavy burden of proving that Kansas users were injured by the Colorado diversions. The State failed to establish clearly that diversions in Colorado had caused "serious damage" to "substantial interests" of both Kansas and its citizens.

Id. at 398, 400. Accordingly, the Court denied the request for relief. *Id.* at 400.

The facts in this case clearly do not support New Mexico's defense of laches. Colorado's appropriator, CF&I, was awarded conditional water rights in May, 1975. Before it could divert the water for application to a beneficial use, New Mexico's appropriators filed suit in federal court to enjoin the planned use. An injunction was issued in January, 1978, with respect to diversions in Colorado from the Vermejo River. Meanwhile, Colorado and New Mexico attempted to negotiate a mutually satisfactory division of the disputed waters. When New Mexico terminated the negotiations (Colo. Ex. 53), Colorado commenced this proceeding in November, 1978. Thus, unlike the Gardena Farms District in *Washington v. Oregon,* both Colorado and its appropriator acted promptly to protect their water rights when those rights were challenged.

New Mexico has also asserted that Colorado failed "to display some sovereign interest" in the Vermejo River (N.M. Br., p. 44). It would characterize this alleged inaction as laches sufficient to bar Colorado from diverting water in the case at bar. From this contention, it is clear that New Mexico does not understand that a state has an inherent interest in the natural resources within its boundaries. *See Georgia v. Tennessee Copper Co.,* 206 U.S. 230, 237 (1907); *Stockman v. Leddy,* 55 Colo. 24, 28, 129 P. 220, 222 (1912). The right to a fair share of those resources is vested and, under normal circumstances, is indefeasible. New Mexico would apparently require a state to take affirmative acts to preserve its rights even when those rights have not been threatened.

When appropriate, Colorado has "displayed" its interest in the Vermejo River. It granted conditional water rights to CF&I; it attempted to negotiate with New Mexico (Colo. Ex. 53); and, finally, it brought this equit-

able apportionment action to obtain a judicial confirmation of its "sovereign interest" in the Vermejo River.

New Mexico's laches argument has no merit. It is simply one more desperate ploy New Mexico would use to apply the appropriation doctrine across state lines, obtain all the water in the Vermejo River and prevent this Court from considering the equities of the case. By invoking the defense of laches, New Mexico has again demonstrated its blind refusal to honor the "reciprocal rights and obligations" imposed upon those states whose boundaries are crossed by the same stream. *Colorado v. Kansas*, 320 U.S. 383, 385 (1943).

V. THE REPORT OF THE SPECIAL MASTER EQUITABLY APPORTIONS THE WATER FROM THE VERMEJO RIVER

The recommendations of the Special Master fairly and equitably apportion the interstate waters of the Vermejo River, giving proper deference to precedents on equitable apportionment and properly weighing all of the relevant factors in this case.

A. Over one-half of the water supply for the Vermejo River system originates in Colorado.

One of the most basic considerations of the case, to which great attention was given at the trial, is that Colorado contributes over one-half of the water in the Vermejo River. For the period of record, 1916-79, an average of 12,919 acre feet of water was available annually at the Dawson gauge (Colo. Ex. 5, Tbl. 2). Based upon Colorado's actual measurements of the flow of the Vermejo River system in Colorado, the Special Master concluded that Colorado's average annual contribution to the Vermejo River system was roughly 8,400 acre feet (Report, p. 3; Tr. 2530, 2531; Colo. Ex. 5, p. 2, Tbl. 4). As the Special Master notes, the facts that Colorado did not include in its estimate the contribution from Colorado of

the North Fork of the Vermejo, and that Colorado's stream gauges measured on the low side, "would appear to compel the conclusion that the estimate of 8,400 acre feet for the Colorado production was somewhat low." (Report, p. 3). New Mexico's Brief disputes none of these facts.

The recorded flow at the Dawson gauge does not, of course, reflect water in the Vermejo River which has been diverted from the river upstream, by the Vermejo Park Corporation, by Kaiser Steel Corporation, or by the proliferating water detention dams, fishponds and stockwater ponds which are not subject to administration in New Mexico (Colo. Exs. 37, 38, 40, 43, 44, 45 and 48). When added to the Dawson gauge flow, these depletions show that Colorado's diversion of 4,000 acre feet annually is approximately one-fourth of the system's total flow.

B. A critical water shortage exists in the area of Colorado where Colorado's apportionment would be used.

Ignored by the New Mexico Brief is another important equity in this case: Colorado would use its share of water to sustain an existing economy beset by chronic water shortages (Colo. Exs. 13 and 15). Implicit in the Special Master's finding that "the injury to New Mexico, if any, will be more than offset by the benefit to Colorado" (Report, p. 23) is the extreme water shortage in Colorado and the benefit which [illegible] water will bring to Colorado.

Colorado's State Engineer, Dr. Jeris Danielson, testified at length regarding the severe water shortage in the Purgatoire River Valley. Demand, to satisfy decreed rights on the Purgatoire below Trinidad, exceeds the supply of available water 99.5% of the time (Colo. Ex. 14-5; Tr. 534). In other words, certain water rights "go without water 99.5% of the time" (Tr. 535). Fifty percent of the

time there is less than 25 cubic feet per second available to meet the 788 c.f.s. demand (Tr. 536; Colo. Exs. 14-5, 14-6).

Officials from the Trinidad region underscored Dr. Danielson's appraisal. The Purgatoire River Water Conservancy District suffers a chronic water shortage (Tr. 539-40). It can well use any Vermejo water, and would willingly participate in any joint development of that water with CF&I or other local entities (Tr. 641).

CF&I's need for additional water to maintain its current operations in the Purgatoire Valley emphasizes the water scarcity in Colorado (Colo. Exs. 13 and 15). Its decrees, dating to 1866, cannot satisfy the demand (Colo. Ex. 13, p. 8).

Contrasted to the noteworthy inefficient uses of Vermejo water in New Mexico, Colorado's use of its portion of that water would be both comprehensive and considered. Colorado Exhibit 13, "Ricardo Creek Project Water Uses and Needs," explains the numerous uses CF&I contemplates. Mining, timbering, agriculture and power generation present immediate needs and uses in this area of Colorado (Colo. Ex. 13, pp. 5, 10, 12-13, 17 and 19).

All of the Colorado witnesses in regard to the usage of water testified that there would be cooperation among themselves in the Purgatoire River area to put this water to its most beneficial use. CF&I testified that it would cooperate with the City of Trinidad, the Purgatoire River Water Conservancy District and the County of Las Animas in this regard. Those entities, through their spokesmen, testified that if for some unforeseen reason CF&I would not or could not completely develop the Vermejo River water usage, they would undertake such development to help satisfy the urgent needs of the area (Tr. 641, 664, 674). Colorado recognizes that as time progresses, the existing water rights of CF&I could be used

by others through joint arrangements, through sale or even as the result of condemnation by a public entity (Tr. 749). CF&I usage would, of course, involve return flows that would augment existing supplies of these local entities.

The Trinidad area of Colorado has been singled out as one justifying particular attention in regard to synthetic fuel development. That city is one of six cities in the country being considered for a pilot plant having to do with the production of methane gas (Colo. Ex. 15). For that reason, among others, the State of Colorado is vigorously pursuing its right to water in this case. Such a project would require an infusion of water to this water-scarce area. New jobs and new activities will be created. At the same time the existing jobs and existing economies will be protected (Colo. Ex. 15).

The Special Master properly considered how Colorado would beneficially use its water allocation. Weighing the relative benefits and detriments to the respective states of an apportionment is a crucial aspect of any case of this nature. As this Court held in *New Jersey v. New York* and *Connecticut v. Massachusetts*, an allocation of water for new uses to sustain or aid in the growth of a region is proper in an equitable apportionment proceeding, especially where such an allocation will not materially injure downstream users. *See* section V.C., *infra*.

C. Adverse impacts on New Mexico from Colorado's diversion can be minimized, if not precluded, through proper administration and conservation efforts in New Mexico.

One of the most striking aspects of this case developed during discovery and trial. New Mexico had asserted from the beginning of this case that the Vermejo River had been fully appropriated in New Mexico for nearly 100

years (N.M. Br., p. 2). The actual facts, however, proved to be quite different. New Mexico, in its case on injury, has relied on technical decrees which bear no relation to actual beneficial use. In addition, New Mexico relied on uses on the Canadian River which would not be affected by diversions in Colorado. New Mexico had claimed that the annual flow was not divertible for irrigation use when, in fact, the largest and most junior Vermejo water user in New Mexico has a ditch with a capacity of 600 cubic feet per second and substantial storage capacity for all the water it diverts (Tr. 1298).

Assuming reasonable conservation procedures in New Mexico, the diversion in Colorado will not materially affect any New Mexico user. Colorado's evidence, in connection with the testimony of New Mexico's chief witness, proved that Colorado's water diversion would not impair in any way the rights of the Vermejo Park Corporation, the Kaiser Steel Corporation, or the Phelps-Dodge Corporation (Colo. Exs. 5, pp. 6-10, 67, 68; Tr. 1018, 1246, 1323, 1379, 2427). The Special Master adopted this conclusion (Report, p. 23). New Mexico's appropriator with the largest decreed rights can be insulated from any adverse effect from the Colorado diversion by instituting presently available conservation practices. The State of New Mexico can further insulate the District through reasonable administration of water rights in New Mexico.

At trial, the evidence showed among other things that the only water user which could potentially be injured by diversions in Colorado was the Vermejo Conservancy District (Report, p. 23; Tr. 1323, 1381; Colo. Exs. 67, 68). It was demonstrated that the District's use of water on a project-wide basis is highly inefficient (Colo. Ex. 71), partially because the majority of the District farmers engage in agriculture on a part-time basis (Tr. 861-862; Colo. Exs. 17, 19, 26); that the District could offset virtually all of the effects of diversions in Colorado by

installing a closed domestic and stockwatering system (N.M. Ex. E-3; Colo. Exs. 69 and 70); that the District has another source of water, the Chico Rico, which it has not attempted to use fully (Colo. Ex. 29); that the District and the State of New Mexico could further limit any injury by insisting on strict administration of senior rights upstream in New Mexico and by insisting that New Mexico's officials carry out their statutory duties to declare that rights upstream, or portions thereof, have been forfeited or abandoned; that the District could be further protected if New Mexico would regulate the proliferation of undecreed, unadministered junior water detention structures, stockwater ponds and fishponds (Colo. Exs. 37, 38, 40, 43, 44, 45 and 48); not to mention other conservation measures of a very significant nature which can be taken, such as reservoir consolidation (Tr. 863). In short, Colorado showed that New Mexico had failed in its basic obligation regarding an interstate stream, "a duty to exercise her right reasonably and in a manner calculated to conserve the common supply." *Wyoming v. Colorado*, 259 U.S. at 484.

1. Conservation efforts available to the District.

The evidence proves that any adverse effect in New Mexico from Colorado's diversions could be offset by constructing facilities within the Vermejo Conservancy District to deliver stockwater by a closed system rather than the open system now in use. Colorado Exhibits 69 and 70, which were derived from New Mexico's own figures, demonstrate this fact, and it was established by one of New Mexico's exhibits, which it pointedly fails to call to the Court's attention in its Exceptions and Brief: New Mexico Exhibit E-3, the Dennis Engineering Report. The basic figures are simple. The District now uses over 2,000 acre feet of water per year for stockwatering purposes, primarily during the winter months (N.M. Ex. E-3, p. 18). With a closed system, this 2,000 acre feet could be reduced to much less than 100 acre feet. In other words,

approximately 2,000 acre feet which are lost through seepage or evaporation could be saved for irrigation (N.M. Ex. E-3, p. 18).

From the efficiency figures and from the figures as to losses in canals and evaporation from the reservoirs, a savings of 2,000 acre feet by the District would offset a diversion of approximately twice that amount in Colorado (Colo. Ex. 70). This computation is based upon New Mexico Exhibits D-2, F-21 Revised, F-29 and F-37, and upon the testimony and notes of Mr. Mutz. In other words, it would take a diversion of approximately 4,000 acre feet from the river to produce the 2,000 acre feet at the fields.

Appendix A to the New Mexico Brief confirms this essential fact, although it is incorrect in other respects as is pointed out below. In Appendix A, New Mexico assumes a Colorado diversion of slightly less than 4,000 acre feet annually. It also assumes that "Conservancy Stockwater Releases" will decrease from 2,000 acre feet to 35 acre feet annually, through installation of the closed system. The net loss to the supply of water available for irrigation of the District's crops is found in the column entitled "Conservancy Irrigation Water." Appendix A shows such net loss to be "-100 acre feet." Thus, by its own document, New Mexico has shown that conservation practices can virtually eliminate injury to the District.

Just as public money paid for the initiation of the Vermejo Conservancy District project and has been subsidizing it on an interest-free basis ever since (Tr. 1557), public money is available to finance the closed system for the delivery of stockwater (N.M. Ex. E-3, pp. 26-27). The minimal cost of the proposed closed domestic and stockwater system in relation to the benefits to be derived from the elimination of waste and the overall maximum beneficial use of water is demonstrated by the Dennis Engineering Report (N.M. Ex. E-3). The report, at pages 26 and 27, analyzes the overall cost in terms of debt repayment, operation and maintenance, etc. The report

assumes, as has been confirmed by the testimony of Mr. Knox, that a substantial part of the construction funds will be in the form of grants from state or federal agencies. The loans will be at a low rate of interest (N.M. Ex. E-3; Tr. 2271).

2. Conservation efforts available to the State of New Mexico.

Unlike the situation in Colorado, the evidence in this case reveals that administration by state officials of the waters of the Vermejo River and the Chico Rico River is virtually nonexistent. New Mexico witnesses testified again and again that they do not involve themselves in administration unless they receive a complaint (Tr. 1063, 2423-2426). There is no supervision of the decrees that pertain to the Vermejo and the Chico Rico (Tr. 2434).

There is no effort on the part of administrative officials to determine whether the proper amount of water is being used under New Mexico's decrees, and private users are not able to do this (Tr. 1863, 1864, 1881, 1967-69). Mr. Compton, the New Mexico water administration official, testified to this (Tr. 987, 1071, 1098-1101). Mr. Reynolds, the State Engineer, confirmed that this was the case (Tr. 2434). New Mexico's Exhibit A-130 shows usage by Phelps-Dodge, during the period of a seepage run from mid-September to mid-October, of all of the water which would be properly allocable to it on an annual basis (300 acre feet). Mr. Davis, representing the Phelps-Dodge lessee (Tr. 2169), testified that there was no measurement of the Phelps-Dodge diversions on a regular basis and that the Springer Cattle Company "took all it could get" (Tr. 2168).

Mr. Reynolds testified that there was no effort to deal with forfeitures and abandonment until and unless a complaint was received, that it was the policy of the State Engineer's office *not* to declare forfeitures (Tr. 2422, 2423, 2426). Even in the face of substantial evidence that the Messick rights, now owned in part by Kaiser Steel

Corporation, had not been used for over 13 years, no abandonment or forfeiture proceeding was commenced. Mr. Compton (Tr. 1088) testified as to this as did Mr. Weimer (Tr. 1589, 1590).

By contrast, Colorado's administration of its rivers is intended to promote beneficial use, eliminate waste, and conserve the supply of water. Dr. Danielson, the Colorado State Engineer (Tr. 516, 517, 518), testified as to the activity of the water commissioners in Colorado and the extent to which they measure water being taken by particular water users and determine proper usage. In the Arkansas Valley Water Division (Division 2), "The Commissioner has daily records, at least during the irrigation season." (Tr. 516) Dr. Danielson then described the administrative system in detail (Tr. 517, 518, 522, 523). He also testified as to Colorado's abandonment procedure, wherein recently some 650 water rights in the Arkansas River Basin were listed as presumptively abandoned, and some 35 on the Purgatoire River alone.

Water administration is as important to the integrity of a water right as is the granting of the right. C.R.S. 1973, §§ 37-92-501, 502; *Wadsworth v. Kuiper,* 193 Colo. 95, 562 P.2d 1114 (1977).

Over and over again the Bureau documents stress the manner in which uncontrolled multiplication of water detention dams, fishponds and stockwater ponds deprive the District of its full share of water (Colo. Exs. 37, 38, 40, 43, 44, 45 and 48). These unrestricted diversions seriously deplete the Vermejo River, as noted in a letter dated April 24, 1975, from Bureau of Reclamation Commissioner Stamm to New Mexico Senator Joseph M. Montoya:

> The [Vermejo Conservancy D] istrict officials feel that the numerous water detention, stockwater, and fish pond structures, which have been constructed during the last 20 years or subsequent

> to the water supply studies associated with the authorization of the [Vermejo] project, are the primary causes of the water shortage.

Colo. Ex. 37, p. 1.

As can be seen in light of the District's own situation, where the stockwater ponds it uses cause the loss of over 2,000 acre feet of water to deliver the needed 35 acre feet, the depletion of the river is substantial (N.M. Ex. E-3, p. 18).

This unregulated depletion of the natural stream flow, especially when it interferes with beneficial uses of water, should not be tolerated. If it so desired, New Mexico, by regulation or statute, could control these structures, prevent the waste which they necessarily occasion, and thereby provide the District with more water. In its Brief in *Arizona v. California*, 373 U.S. 546, New Mexico stressed that "each of the States [has] a duty to exercise her right reasonably and in a manner calculated to conserve the common supply." (N.M. Br. at p. 19, quoting *Wyoming v. Colorado*, 259 U.S. at 484.) Colorado asks that New Mexico act accordingly. By adopting these conservation practices, practices which are easily within reach, Colorado and New Mexico can share the benefits of the river, with little or no injury to existing uses.

D. It would be inequitable, and contrary to precedent, to deny Colorado water in order to permit New Mexico to continue wasteful practices.

A primary argument advanced by New Mexico is that water has never been awarded for "future developments . . . at the expense of an existing economy." (N.M. Br., p. i.) Our discussion in section IV.B. of this brief shows this is not the case. *New Jersey v. New York; Connecticut v. Massachusetts*. Our discussion in section V.C. above

demonstrates that the evidence shows adverse effects on the "existing economy" in New Mexico can be avoided through reasonable conservation practices.

New Mexico has greatly exaggerated the economic realities of the District. To the extent New Mexico relies on paper decrees and acreage in the District that has never been irrigated, it attempts to preserve water to protect future uses at best. Because of the history of the District, it is apparent that those future uses are unlikely to develop. With regard to the District, Colorado asserts that the District and the other New Mexico users have a duty to prevent waste. "Equity abhors waste and delights to restrain it in a proper case." *Finney Co. Water Users Ass'n v. Graham Ditch Co.*, 1 F.2d 650, 652 (D. Colo. 1924). The evidence showed that one of the main reasons for the inefficient use of water in the District was the fact that so few of the District members depend upon agriculture for their livelihood, hence little time is invested in sound water management practices.

Having heard the evidence, the Special Master rendered the following summary of the District:

> The Vermejo Conservancy District is the largest user of Vermejo water in New Mexico. The Vermejo is not, however, the only source of water for the District. Approximately 1/3 of the District's water supply comes from the Chico-Rico system which also originates in Colorado.
>
> In the early 1950's, the District was part of a large reclamation project. Although doubt about the effectiveness of the project was expressed from the start, the project was still completed. The projected impact and effect of the project have never been realized. The passage of time has confirmed the fact that the project should never have been built. The District has not made any pay-

> ments for the project for many years. Unfortunately, the project is a failure in spite of the tremendous outpouring of money, effort and time. At no time in the history of the project has the full amount of acreage to be irrigated under the project been irrigated.
>
> . . . .
>
> Most of the farmers in the area are employed in other jobs in addition to maintaining their farms. The jobs held by these farmers are mainly full-time jobs, although some do hold part-time jobs.

Report, pp. 7, 8.

This conclusion is important for several reasons. It undercuts New Mexico's argument that the people living within the District are an existing agricultural economy dependent upon irrigation and agriculture for a livelihood. It also supports Colorado's position that the District has an extremely wasteful system of water distribution, and that it would be inequitable to force Colorado to forego its rightful share of water to subsidize that use.

Nowhere is the situation of the Vermejo Conservancy District better described than in the various Bureau of Reclamation documents and other public records which are among the exhibits in this case. We start with the fact that the predecessor of the District, the Maxwell Irrigation Company, had gone bankrupt (Colo. Ex. 34). Congress, after an initial veto, passed the enabling legislation for the present reclamation project. In New Mexico Exhibit C-2, the "Plan for Rehabilitation for the Vermejo Project, Project Planning Report," is a letter from President Truman in which he described the situation as "a rescue project." Thereafter, the project continuously failed to make any appreciable payments on the over

$2,000,000 indebtedness (Colo. Ex. 48). There is no obligation to pay interest (Tr. 1557).

Under date of September, 1962, a report was written regarding the current economic conditions of the project in connection with a request for the extension of the development period (Colo. Ex. 36). This report said that "there has been little improvement over what it [the condition] was several years ago." It said that an analysis of the 1961 ownership "shows a total of 86 owners" with over one-half owning 80 acres or less, with the average ownership being 86 acres.

The report said that nearly 1,000 acres of the project lands "have not been developed and irrigated since the project was rehabilitated." It stated that: "There are relatively few farm homes and farmsteads on the project. Some of the farm operators live in the towns of Maxwell or Springer and others live in Raton. There are many absentee owners who rent their property to the few resident operators." Mr. Weimer, the Regional Director of the Bureau of Reclamation, testifying at the trial stated that the conditions as reported in this report of 1962 are very much the same today (Colo. Ex. 36; Tr. 1569-70).

Colorado Exhibit 38 is a memorandum from the Acting Commissioner of Reclamation dated June 3, 1976, regarding "a bill for the relief of the Vermejo Conservancy District." In that memorandum, he refers to the water detention structures as the primary cause of the water shortages as well as the condition of the "diversion dams and supply canals which often become clogged with debris and silt." He says that because of this, "much of the available runoff, which is normally available to the District, cannot be diverted." He mentions that "the Chicorico Creek, which derives its water largely from rainfall and high runoff, has produced the only major supply of water for the project." That memorandum concludes that "there is no practical solution to the District's

repayment problem and, therefore, the entire remaining construction obligation amounting to $2,065,099 as of August, 1975 should be cancelled." This fact was confirmed by Mr. Weimer in a March 17, 1978 memorandum, where he recognized that the repayment obligation, which at that time had increased to $2,107,923, "will have to be written off." (Colo. Ex. 44).

Finally, in Colorado Exhibit 46, there is a letter dated September 26, 1978 from the Acting Assistant Secretary of the Department of the Interior to Senator Henry M. Jackson as Chairman of the Committee on Energy and Natural Resources. In that letter appears the following statement:

> The sad story of the Vermejo Project is a good example of the need for an adequate understanding of the economic and environmental ramifications of a reclamation project *before* it is authorized and funded. Based on our current understanding of the hydrology and soil characteristics of the area and the potential of the area for economic production of crops, this project probably should not have been authorized. The fact that we find ourselves faced with a decision to defer and possibly write-off costs owed the United States because a project has not lived up to its expectations is evidence of the need for a more sound approach to evaluating and authorizing projects.

Bureau of Reclamation Regional Director Weimer went even further. When asked if he agreed with the statement quoted immediately above from Colorado Exhibit 46, he answered:

> Based on current understanding of hydrology and based on current policy within the Department of Interior, I would make the statement even

> stronger than that. That if the project was being studied today, that it would not have been built.

Tr. 1586.

As if to support these admissions that the Vermejo project is not a carefully managed farming operation, the realities of the people living within the District demonstrate that few of these people depend upon farming for their livelihood. The "Vermejo Project Report" dated February, 1949 (Colo. Ex. 17, p. 4), indicates that in 1949 some 60% of the area farm operators depended on off-farm income. The ten-year period preceding 1949 appears to have been one of the wettest periods of record (Colo. Ex. 6, p. 8). This part-time situation was echoed in 1952 in "Definite Plan Report" for the Vermejo Project (Colo. Ex. 19, p. 18).

By 1962, following rehabilitation of the District's diversion and storage works, the reliance upon farming had, if anything, decreased. In a report issued by the Bureau of Reclamation dated September, 1962 (Colo. Ex. 36, pp. 6-7), the following statements appear:

> At the time the project rehabilitation was completed in 1955, farm buildings and improvements were in a bad state of repair and most of them had little salvage value. Many of the farm operators lived in the town of Maxwell and had few, if any, improvements on the farm. During the last 3 to 4 years, a few of the more enterprising farmers have built some nice homes on their farms; but, in general, there has been little improvement over what it was several years ago.

As indicated above, Mr. Weimer testified that the situation described above continues today (Tr. 1569, 1570). According to the 1962 report, few farmers made any improvement to their farms even after the $2,000,000

redevelopment project. The average farm size in 1962 was only 86 acres, hardly a viable farming unit (Colo. Ex. 36, p. 8). Some of the "farmers" lived as far away as Raton, a distance of over 30 miles (Colo. Ex. 36, p. 13). Because they live at such a distance from their farms in the District, their use of the water that is available is bound to be inefficient.

This inefficient manner of the District's water use is well-established in the record. Only approximately 30% of the water available to the District is applied to a beneficial use (Colo. Ex. 71). While an annual average of 14,535 acre feet of water was available to the District from all sources, only an average of 3,575 acre feet was actually applied to a beneficial use (Colo. Exs. 70 and 71). The poor condition of the District's diversion works and structures prevents it from diverting all that it is entitled to (Colo. Ex. 37). The State of New Mexico has noted and verified the "excessive losses in the canals and laterals when making farm deliveries" (Colo. Ex. 41, p. 3). An official from the Maxwell Wildlife Refuge has termed the management practices by the Vermejo Conservancy District to be "questionable" (Colo. Ex. 42, last page). It is respectfully submitted that an operation committed to full-time farming would simply not allow such practices to continue.

By 1975, the number of District people depending upon outside income to support themselves increased. This factor suggests why the District's use is so inefficient, and confirms the increasingly small number of water users primarily dependent upon irrigation. In a letter from Vermejo Conservancy District President Durward Sims to the Honorable Joseph M. Montoya, dated February 25, 1975, wherein relief from the loan repayment requirements was sought, the following statement appeared:

> We believe, that without exception, every farmer in this area is supported to some degree from an off-farm job or income.

Mr. Knox, who apparently has the largest farm in the District, has been employed for years at the Springer Boys School in a 40-hour per week job (Tr. 1889). Mr. Spencer has full-time responsibilities as the District Manager (Tr. 1932-35). The list continues. Typical of the farming situation in this area are the cases of Mr. Pompeo and Mr. Ray Porter, both of whom have full-time jobs elsewhere; Pompeo as a school superintendent (Tr. 2194, 2204), and Porter as an employee of a cattle company (Tr. 2186, 2189). These are two of the users taking from the District diversion canal above the reservoirs.

Possibly the most current information with regard to the part-time farming operation is New Mexico's own Exhibit C-9, a 1979 crop production report. It states that as of that time there were 35 part-time farmers and only 19 full-time farmers.

The law of prior appropriation itself imposes a duty to use water in a reasonably efficient manner as do the Colorado Statutes. C.R.S. 1973, § 37-92-502. For example, the Colorado Supreme Court, in the case of *Town of Sterling v. The Pawnee Ditch Extension Company*, 42 Colo. 421, 94 P.339 (1908), made the following statement with regard to the economical use of water:

> The law contemplates an economical use of water. It will not countenance the diversion of a volume from a stream which, by reason of the loss resulting from the appliances used to convey it, is many times that which is actually consumed at the point where it is utilized. Water is too valuable to be wasted, either through an extravagant application for the purpose appropriated, or by waste

> resulting from the means employed to carry it to the place of use, which can be avoided by the exercise of a reasonable degree of care to prevent unnecessary loss, or loss of a volume which is greatly disproportionate to that actually consumed. [Citation omitted]. An appropriator, therefore, must exercise a reasonable degree of care to prevent waste through seepage and evaporation, in conveying it to the point where it is used. In cases where this question arises, the purpose for which the appropriation is made and the proportion of the diversion actually applied to a beneficial use, as compared with the volume diverted, would doubtless be important matters to consider.

42 Colo. at 430, 94 P. at 341-42.

The above quotation is remarkably pertinent insofar as the Vermejo Conservancy District is concerned, with its loss of approximately two-thirds of the water between the point of diversion from the river and the farm usage. It would be eminently unfair and inequitable to penalize one state with regard to its rights to water in an interstate stream because of the lax administration or the wasteful uses in another state. In Colorado, the owner of a water right is entitled to only such water as he puts to "beneficial use." *The New Mercer Ditch Co. v. Armstrong*, 21 Colo. 357, 40 P. 989 (1895). This term is defined in Colorado statutes and is referred to in numerous Colorado cases. *See, e.g., Archuleta v. Ditch Company*, 118 Colo. 43, 192 P.2d 891 (1948).

Colorado does not believe these people will be deprived of their farming by this action. Instituting the described conservation practices will preserve that farming and will relieve Colorado of the burden of subsidizing such wasteful uses.

E. Specific points raised by New Mexico.

New Mexico argues that the Special Master "did not understand or properly analyze much of the technical evidence" (N.M. Br., p. 2). As support for this statement, New Mexico says the Special Master found that a "*major irrigation district* in New Mexico 'is inefficient, resulting in a water loss which can run as high as 33%.'" (N.M. Exceptions, p. 2, emphasis added). The Special Master actually stated, "The *system of canals* used to transport the water to the fields is inefficient, resulting in a water loss which can run as high as 33%." (Report, p. 8, emphasis added). What the Special Master actually said, and what New Mexico claims he said, are different. New Mexico changed the subject of the Special Master's sentence.

New Mexico argues this shows the Special Master "found that [the District] has an unrealistically ideal efficiency of 67%." (N.M. Br., p. 3) Nowhere does the Special Master contend that the District has a water use efficiency of 67%. The Special Master's statement concerned only the District's "*system of canals* used to transport the water to the fields" (Report, p. 8, emphasis added), and not the entire system, which includes reservoirs where over 3,000 acre feet are lost through evaporation, and a diversion structure from the river to the reservoirs where 10% is lost due to seepage (Colo. Ex. 70; Tr. 1271). The canals carry water from the District reservoirs to the farm headgates. The Special Master correctly notes that the District's efficiency in getting water from the reservoirs to the farm headgate is roughly 33%. New Mexico's primary witness, Mr. Mutz, indicated these canal losses alone were between 25% and 50% for the District (Tr. 1315). Mr. Helton, Colorado's expert witness on the hydrology of the Vermejo River system, estimated such canal and lateral losses at about 37.5% of the total amount of water diverted by the District (Colo. Exs. 69 and 70; Tr. 2571). The Special Master's figure of 33% loss from the District's "system of canals" is

supported by the evidence. Other losses, bringing the total loss to some 67% of the available water, include losses between the diversion works and the reservoirs (Tr. 1279), losses from reservoir evaporation (Colo. Exs. 68 and 70), and losses from the Chico Rico diversions.

The Special Master's Report shows an appreciation of the evidence. The "system of canals" does have a water loss which can run as high as 33%. It is not the Special Master's "evaluation" of the evidence that is "flawed" as alleged by New Mexico on page 3 of its Exceptions; it is New Mexico's evaluation of the Report that is flawed.

At item 3 of its Exceptions, New Mexico criticizes the Special Master because, it says, he "ignored 41,000 acres of irrigated lands" below the point where the Vermejo connects with the Canadian River. The Special Master did not "ignore" that acreage. Rather, New Mexico failed to prove its contention that Vermejo water reached downstream users, much less that those users applied any such water to a beneficial use. The District has the right and ability to divert the entire flow of the Vermejo River (N.M. Ex. F-29; Colo. Ex. 19). Therefore, if users downstream from the District do receive Vermejo water, it is as a result of the District's negligence in exercising its rights. The Special Master rightly concluded, "There was no competent evidence of any dependency on Vermejo water by users downstream from the Vermejo Conservancy District." (Report, p. 4; N.M. Ex. F-29)

Supporting the Special Master's finding is the fact that the District's diversion structure is capable of diverting the entire flow of the Vermejo River just below the Dawson gauge some 99.9% of the time during the period of record (N.M. Exs. F-18, D-1, p. 23). New Mexico's own Exhibit F-29 shows that in only six years out of thirty were there any spills of water at the Vermejo Conservancy District diversion works. *See also* Colo. Ex. 66. The evidence further shows (Tr. 1112, 1327; Knox Dep.,

pp. 34, 35, 40, 41) that there are no calls for Vermejo water below the Vermejo Conservancy District headgate. The Bureau of Reclamation's Definite Plan Report for the Vermejo Project states, "There is no requirement for by-passing water for downstream uses; therefore it is all potentially divertible by the project." (Colo. Ex. 19, p. 29)

In this same item 3, the Special Master is criticized for adopting the "historic use" figures with respect to the water users on the Vermejo. New Mexico's Exhibit F-37 shows that for the ten years of the 1970's, i.e., 1970 through 1979, the Vermejo Conservancy District irrigated an average of 4,147.4 acres per year, and that for the ten years of the 1960's, i.e., 1960 through 1969, the District irrigated an average of 4,573.8 acres per year. Although the irrigated acreage figure is somewhat less for the 1970's than for the 1960's the difference hardly indicates that the 1970's represented a "severe drought" in comparison to other periods.

This ability of the Vermejo Conservancy District in the 1970's to irrigate an average of 4,147.4 acres per year is perhaps the most conclusive refutation of the contention by New Mexico that there wasn't enough water for the senior priorities of Phelps-Dodge and Vermejo Park Corporation to irrigate more than 150 acres and 250 acres respectively during the 1970's. They could have taken water which otherwise went to the Vermejo Conservancy District to accomplish this additional irrigation if they had really wanted to accomplish it. Thus, whether the 1970's were a "severe drought" or not under New Mexico's categories, there was not such a drought that precluded the first and second priorities on the river from irrigating more acreage than they did. Of course, New Mexico's own witnesses have acknowledged that a drought was not the reason that these two entities did not irrigate more (Tr. 2174-2176, 2427).

New Mexico cannot reasonably argue that the ability of the users upstream from the District was impaired by water availability during the 1970's. The Vermejo Park Corporation, which acquired the property in 1973 and operates it primarily as a hunting and recreational ranch, with second priority on the river, never irrigated more than 250 acres (Tr. 2068, 2097). This was by choice, not by result of water limitations. Mr. Reynolds, New Mexico's State Engineer, indicated that Vermejo Park could have irrigated more from its available water supply (Tr. 2427). Colorado Exhibit 68, based upon New Mexico's figures, proved that Vermejo Park could have irrigated twice the amount of acreage it irrigated. In 1979, for example, when over 7,600 acre feet of water passed the Vermejo Park diversion points between April and October, Vermejo Park diverted only 506 acre feet (Colo. Ex. 68). Vermejo Park experienced no "drought," only an intent not to use its water rights.

Similarly, the evidence does not support New Mexico's claim that the Phelps-Dodge "historic use" was restricted by water availability in the 1970's. Phelps-Dodge claims it irrigated but 150 acres annually during that period (Colo. Ex. 6, pp. 6-7), although the general manager of the District testified that he did not think Phelps-Dodge or its lessee irrigated more than 80 acres (Knox Dep., p. 54; Colo. Ex. 6, pp. 6-7). Bearing in mind that Phelps-Dodge is only entitled to 2 acre feet per acre, i.e., 300 acre feet of water annually for the 150 acres, it is difficult for anyone to contend that there was not enough water in the Vermejo River to provide more than 300 acre feet annually. At least ten times that much, and more often twenty or thirty times that much, went by the Dawson gauge annually. Colorado's Exhibit 67, prepared specifically to demonstrate water availability to that user, shows the fallacy in the New Mexico argument. Furthermore, it was the Phelps-Dodge decision not to repair its diversion works which has limited its irrigated acreage, and not any shortage of water (Tr. 2174; N.M. Br., p. 27).

The "severe drought" during the 1970's of which New Mexico complains evidences its disregard for the facts in the record. That evidence shows that New Mexico has not fully used its decreed rights, even when water has been available. Referring to decreed rights, as opposed to actual diversions, is an attempt to inflate the extent of New Mexico's use of the Vermejo River and to provide water for future rather than existing uses.

New Mexico asserts in Exception No. 4 that the Special Master, following "a line of reasoning that has been expressly rejected by the Court," concluded that there would be no injury to New Mexico if Colorado was awarded "essentially all of the dependable flow of the river," suggesting that 4,000 acre feet is all of the dependable flow. There are no citations to the record supporting these statements.

The question of the just measure of available water for purposes of a decree in equitable apportionment has commanded considerable discussion in previous cases. *Nebraska v. Wyoming*, 325 U.S. at 620-622; *Wyoming v. Colorado*, 259 U.S. at 471-486. Each case was decided upon consideration of the evidence. While New Mexico raises the question of "dependable flow," it never answers that inquiry, or even suggests what might be a proper basis for resolving the question. The Special Master did, in fact, address that issue. He considered the annual flows for the entire period of record at the Dawson gauge, for the years 1955-1979 and 1950-1978, as well as the actual measurements of Colorado's contribution to the Vermejo System and New Mexico's altitude runoff calculation of that contribution (Report, pp. 2-3, 23). Based upon all of the evidence before him, he found that "sufficient water is available for Vermejo Park Corporation, Kaiser Steel, and Phelps-Dodge." (Report, p. 23)

That conclusion is supported by Colorado Exhibits 67 and 68, which take into account the effects of a Colorado

diversion upon Vermejo Park and Phelps-Dodge, and which show that even in the lowest years a great deal more water would be available than would be required by those entities. Kaiser Steel receives approximately 25% of its water from a tributary in York Canyon (Tr. 1744); making it a source which would in no way be affected by Colorado's diversion. The remainder of its requirement, or less than 300 acre feet annually, would obviously be available based upon measurements at the Dawson gauge in even the lowest of years, bearing in mind that 400 acre feet of Kaiser's water are first priority under its lease from Phelps-Dodge. (Colo. Ex. 5, Tbl. 2; Colo. Ex. 6, Tbl. 2). This data, and the Special Master's conclusion that the three corporations would be unaffected by Colorado's diversions, is further supported by Mr. Mutz who stated that "the effect of [the Colorado] diversion would be essentially felt in its entirety on the water users of the Vermejo Conservancy District." (Tr. 1323) Contrary to New Mexico's statements, there would be a dependable flow for those direct flow users.

"Dependable flow" must be viewed in a different context as regards the District. The diversion works and the reservoirs maintained by the District permit it to store water, thereby allowing the District to create its own dependable supply. This Court acknowledged the utility of such a storage system in *Wyoming v. Colorado*, saying:

> According to the general consensus of opinion among practical irrigators and experienced irrigation engineers, the lowest natural flow of the years is not the test [of dependable supply]. In practice they proceed on the view that within limits, financially and physically feasible, a fairly constant and dependable flow materially in excess of the lowest may generally be obtained by means of reservoirs adapted to conserving and

> equalizing the natural flow; and we regard this view as reasonable.

259 U.S. at 484.

The very purpose of the District's reservoirs is to provide a dependable flow from a somewhat erratic supply. Perhaps because of these reservoirs, New Mexico concedes in Appendix A of its Brief that Colorado's diversion will reduce available irrigation water from the Vermejo River to the District by a mere 100 acre feet annually, and will not affect the supply from the Chico Rico.

New Mexico grasps at straws in criticizing the Special Master's Report upon the basis of dependable flow. New Mexico presents no citation to show the Report fails to consider dependable or available flow. The basic facts of the case demonstrated that the corporations upstream from the District will always have an adequate supply of water. The individual users between the District's headgate and the reservoirs, all of whom have priorities senior to the District, will likewise have an adequate supply based on the fact that the annual flow at the Dawson gauge is approximately three times the amount of water which Colorado would divert and due to the accretions to the river below the Dawson, which accretions alone are sufficient to satisfy the individual users (Tr. 1405, 1406, 1463-65). The District, by effectively using its storage system, and by taking reasonably available conservation practices previously discussed, can continue at its present level and maintain a dependable supply of Vermejo River water. Additionally, the District's Chico Rico supply, some 30% of the total supply, will be enhanced by better reservoir practices.

In its Brief (pp. 4, 6 and 8), New Mexico refers to the case of *Kaiser Steel Corporation v. CF&I Steel Corporation*, No. 76-244 (D. N.M. 1976). This case is on appeal to

the Tenth Circuit, which has stayed proceedings during the pendency of this case. A brief description of that case is in order. It did involve a suit by the New Mexico water claimants against CF&I to enjoin the diversion of water by CF&I in Colorado. The plaintiffs moved for summary judgment on the basis of certain affidavits submitted with the motion and the injunction was granted by means of the summary judgment. There was no trial, contrasting dramatically with the sixteen full days of trial conducted by the Special Master. Judge H. Vearle Payne, the United States District Judge granting the injunction, in his letter of December 9, 1977, to counsel stated as follows:

> The Court is of the opinion that "the equitable apportionment of the waters" of the Vermejo River does not apply in this case. Neither Colorado nor New Mexico is a party to this action and no adjudication has been made between the states.

To bolster its argument that the doctrine of prior appropriation should govern the outcome of this case, New Mexico purports to show that both Colorado and New Mexico have the same water law (N.M. Br., p. 8). This, however, is not the case. In fact, one of the considerations before the Special Master was the fact that New Mexico's practices are different regarding non-use and abandonment, administration and waste. The fact that two states ostensibly follow the priority of appropriation doctrine by no means establishes that they have the same law or practice as to administration or as to the effectiveness of water rights themselves. For example, the State Engineer of the State of Colorado testified (Tr. 516, 517, 518) as to the daily surveillance of water diversions by water commissioners. By contrast, the Assistant Chief of the Water Rights Bureau of New Mexico, Mr. Compton, who is in charge of water administration under the State Engineer, testified (Tr. 1098-1101) that in New Mexico no check is made to determine

whether the proper amount is being diverted in relation to the acreage to be irrigated. Likewise, Dr. Danielson, the State Engineer of Colorado, testified (Tr. 563, 565) as to action taken by him with respect to the abandonment of water rights, thirty-five put on the abandonment list in the Purgatoire River Basin alone, whereas Mr. Reynolds, the New Mexico State Engineer (Tr. 2425) and Mr. Compton (Tr. 1086-89) testified that they have taken no action with respect to forfeiture or abandonment on the Vermejo. Dr. Danielson also testified that Colorado looks to the beneficial use of the water (Tr. 517), whereas Mr. Compton (Tr. 1078) testified that New Mexico looks to the decree. This practice in New Mexico permits rights such as the Messick rights to be transferred to Kaiser Steel, when there is ample evidence that those rights had not been used in many years (Colo. Ex. 49, pp. 4-6; Tr. 1975). To claim that Colorado and New Mexico apply the same water laws, for the purpose of advancing an erroneous argument that the doctrine of prior appropriation controls this case, compounds the flaw in New Mexico's theory of the case.

The New Mexico Brief is rife with predictions as to how the Special Master's apportionment will affect New Mexico users (N.M. Br., pp. 10, 18, 29). New Mexico goes so far as to say, "As recognized by the Master in this case, CF&I's proposed diversion will destroy the Vermejo Conservancy District in New Mexico." (N.M. Br., p. 18.) The Master nowhere makes such a statement. In fact, the Master said the opposite, concluding:

> It is the opinion of the Master that a transmountain diversion would not materially affect the appropriations granted by New Mexico for users downstream.

Report, p. 23.

New Mexico predicts the Colorado diversion will destroy not only the District, but also the United States' Maxwell Wildlife Refuge (N.M. Br., p. 29). As discussed above, the District can insulate itself from any injury through reasonable conservation measures (*see also* N.M. Br., App. A). John Brock, the Wildlife Refuge Manager, testified that Reservoirs 12 and 14, which are within the Refuge and leased from the District, "are fed from the Chicorica [sic] primarily." (Tr. 2046, 2051.) Colorado's diversion will not affect the Chico Rico. In short, New Mexico's predictions are not warranted by the facts presented before the Special Master.

New Mexico cites a portion of the Special Master Report in *Arizona v. California*, wherein it was stated:

> It would be unreasonable in the extreme to reserve water for future use in New Mexico when senior downstream appropriators remain unsatisfied.

N.M. Br., p. 21, quoting Master Report, *Arizona v. California*, Dec. 5, 1960, p. 332.

While this quote may have had relevance to the facts in *Arizona v. California*, the facts before the Court do not support its application here. As we explained above, the needs in Colorado are real, and the existing economy in the Purgatoire Valley will use any water. As the evidence showed, the effect of the diversions in Colorado could be offset by reasonable conservation measures (Report, p. 23).

On pages 34 and 35 of its Brief, there is a reference to New Mexico's Appendix A, which is an example of mixing apples and oranges and which is therefore incorrect in several respects. It is stated that this Appendix A was calculated on the basis of Colorado Exhibits 69 and 70. These two exhibits employ different premises, making their use as a combined exhibit

improper. Colorado Exhibit 69 was prepared to show the effect of a diversion in Colorado of 3,600 acre feet, the amount of water New Mexico said would be available at the Colorado diversion points. In that calculation for Exhibit 69, the *actual* conditions were represented and were based on the testimony and evidence in the record. That is, the depletions, the accretions and losses were the actual figures established by the record as being the current conditions. With respect to Exhibit 70, Colorado again used New Mexico's figure as to the amount of water produced by Colorado, which was significantly less than Colorado's figure, and then used New Mexico's claimed *decreed* rights, not the actual usage.

Aside from the *non sequitur* assumptions, Appendix A is internally inconsistent. For example, it shows that after a Colorado diversion of 3,600 acre feet, Kaiser Steel would receive nearly three times the amount of water that it now receives (240 acre feet after, as compared to 90 acre feet before). To the extent Appendix A claims that upstream New Mexico users would be injured by the Colorado diversion, it contradicts the testimony of New Mexico's primary witness, Mr. Mutz (Tr. 1323). The bottom line of the last column does show, however, that the Colorado diversion would, by New Mexico's own calculations, only take 100 acre feet from the District's irrigation supply.

New Mexico's use of Appendix B to its Brief, to which it refers at page 34, is misleading. Not only do the listed decreed rights not correspond to actual use (*see* section V.D.), but the right listed for the Vermejo Conservancy District is nearly twice the amount of acreage which the District may now irrigate. By letter dated January 2, 1953, the Secretary of the Interior reduced the amount of acreage irrigable by the District to 7,379 acres, contrasting with the decreed right of 14,621.55 acres (Colo. Ex. 33). Thus, nearly thirty years have passed since the District had a right to irrigate the amount of acreage listed in Appendix B.

New Mexico's economic report (N.M. Ex. 33), cited at page 37 of the Brief, contains an error similar to that present in much of New Mexico's argument: overstating the impact of Colorado's diversion on New Mexico. As its basic premise, the economic report assumed that Colorado would divert the *entire* flow of the Vermejo River (Tr. 2305, 2313-14, 2322). Because of the fact that Colorado would divert less than one-half of the water which it produces, and only approximately one-fourth of the Vermejo River virgin flow, the fundamental error in the study's basic premise is fatal to the Armageddon-like conclusions which follow.

New Mexico concludes its discussion under "Point II" with speculation that "the Master looked only to the expert testimony" as to Vermejo water supply (N.M. Br., p. 40). The portions of the record which are then cited were all evidence which was before the Special Master. Because the Special Master did not base his ruling upon certain portions of the record means only that other portions of the record were deemed more convincing. The Master was in the unique position to judge the credibility of the witnesses, as well as the weight to be given their testimony. His conclusions are amply supported by the record.

VI. CONCLUSION

New Mexico, although professing concern with the equities in this case, bases its efforts to prevail on attempts to preclude a full consideration of all factors presented to the Special Master, urging this Court to consider no factor other than priority of appropriation. New Mexico's contrived legal theory would result in denying much needed water for use in Colorado to subsidize inefficient and wasteful practices in New Mexico. Colorado believes the Special Master's conclusion was the correct one based on a consideration of all the equities in the case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert F. Welborn, hereby certify that I am a member of the bar of this Court and counsel of record for the plaintiff and that on May 7, 1982, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be mailed the requisite number of copies of the foregoing Reply Brief, by first class mail, postage prepaid, to the following officials of the State of New Mexico:

The Honorable Bruce King
Governor of the State of New Mexico
State Capitol
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The Honorable Jeff Bingaman
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I certify that on May 7, 1982, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be served by Federal Express the requisite number of copies of the foregoing Reply Brief on the following counsel of record:

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I certify that all parties required to be served have been served.

Robert F. Welborn
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF COLORADO, *Plaintiff*

v.

STATE OF NEW MEXICO
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE OF
NEW MEXICO, *Defendants*

MOTION FOR LEAVE TO FILE REPLY BRIEF OF THE STATE OF NEW MEXICO AND REPLY BRIEF OF THE STATE OF NEW MEXICO

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June 4, 1982

No. 80, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF COLORADO, *Plaintiff*
v.
STATE OF NEW MEXICO
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE OF
NEW MEXICO, *Defendants*

MOTION FOR LEAVE TO FILE REPLY BRIEF OF THE STATE OF NEW MEXICO

COMES NOW the defendant, State of New Mexico, pursuant to Rules 9(2) and 9(6) of the Rules of the Supreme Court of the United States, and hereby moves the Court for leave to file the attached Reply Brief. In support thereof, New Mexico states:

1. The State of New Mexico filed its Exceptions to the Report of Special Master and Brief in Support Thereof with the Court on April 8, 1982. The State of Colorado filed its Reply Brief of the State of Colorado on May 7, 1982.

2. The Reply Brief of the State of Colorado has presented this case to the Court under an erroneous legal theory on the basis of an incomplete discussion of the precedents in which the defendant is asserted to have the burden of proof in original actions.

3. In its Reply Brief the State of Colorado has distorted the facts in the record with respect to water usage from the Vermejo River in New Mexico and other matters critical to a determination of the issues in this case.

4. Colorado's brief contains an extensive response to points raised in New Mexico's brief. New Mexico must reply to points contained in Colorado's brief so that the Court can fairly appreciate the significance of the facts and legal points at issue in this case.

5. A decision of this Court based upon facts recited in Colorado's brief would be prejudicial to established property interests in New Mexico.

WHEREFORE, the State of New Mexico respectfully moves the Court for permission to file the attached Reply Brief of the State of New Mexico.

Respectfully submitted,

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ATTORNEY GENERAL OF THE STATE OF
NEW MEXICO, *Defendants*

REPLY BRIEF OF THE STATE OF NEW MEXICO

INTRODUCTION

The Reply Brief submitted by the State of Colorado on May 7, 1982, is based upon a biased, partial, and frequently incorrect recitation of the facts. It consists of evidence which minimizes existing requirements for Vermejo River water in New Mexico by reducing the amount of water appropriated by New Mexico interests to that occurring during a period of drought, disguises the drought conditions which affect all of New Mexico's water users, and excludes existing rights on the

Canadian River to which the Vermejo is tributary. It was derived in equal measure from an effort to manufacture equities in Colorado to support the Special Master's Report and to make credible the factual errors in the Report. For example, the Special Master states with respect to water use for the Vermejo Conservancy District that "[t]he system of canals used to transport the water to the fields is inefficient, resulting in a water loss which can run as high as 33%." (Special Master Report, p. 8).[1] This was used to support his conclusion that the District is infeasible. (Report, p. 7). In the Exceptions to Report of Special Master, New Mexico demonstrated that the Special Master had understood the evidence relating to irrigation efficiency conceptually backwards and found an unrealistically ideal efficiency of 67% for the District, (New Mexico Exceptions at 2), a conclusion which refutes the point that the Special Master is trying to make. Colorado attempts to correct the Master's error by arguing that the Master was referring only to the system of canals from the District's reservoirs to the farm headgates, (Colorado Brief at 64), rather than the entire system, including the canals from the diversion structure to the reservoirs. Colorado says "The Special Master correctly notes that the District's efficiency in getting water from the reservoirs to the farm headgate is roughly 33%." (Colorado Brief at 64). This effort is contrived. In fact, the Master referred specifically to the District's "system of canals." The statement is unqualified. It is not limited merely to canals from the reservoirs to the fields and thus refers to the entire network of canals serving the District including those from the river to the reservoir and the reservoir to the fields. The Special Master equated a low rate of loss with an inefficient system when the opposite is true. The evidence reflects that New Mexico estimated the loss from the system of canals to average 47½%, but stated that the loss can range from 35% to as

[1] The Special Master's Report shall hereinafter be referred to as Report.

high as 60%. (Tr. at 1280, 1315). Colorado adopted New Mexico's average loss rate of 47½% from the system of canals. (Colorado Exhibits 69, 70). The Master's statement does not reflect the evidence used by both states — only his own misunderstanding.

The fact of the matter is that the Master did not understand the evidence relating to efficiency, just as he failed to attribute significance to the uncontroverted facts relating to drought and the amount of acreage historically irrigated in New Mexico. Colorado's attempt to rectify the Master's errors profoundly distorts what occurred during the fact finding process. Colorado also distorts the record unfairly and prejudicially. Accordingly, we are compelled to respond.

Point I

THE PLAINTIFF HAS THE BURDEN OF PROOF IN ORIGINAL ACTIONS TO APPORTION INTERSTATE WATER.

In its Reply Brief, Colorado attempts to justify the Special Master's Report by arguing that New Mexico failed to sustain the burden of proving injury by C.F. & I.'s proposed diversions from the Vermejo River in Colorado. Colorado incorrectly states that the burden of proof in this original action rested upon the defendant, not the plaintiff.[2] (Colorado Brief at 1, 32-33). This argument is premised on the fact that the plaintiff in interstate water disputes has usually been the downstream state which

[2] While this is the position that is urged upon the Court at this time, in oral argument before the Special Master Colorado took a different position, arguing that in equitable apportionment actions "no side has a burden of proof" because the "matter is thrown open on the equities." (Tr. at 2887).

relies on the flow of water from upstream across the state line.[3] This fact has nothing whatever to do with the established order of burden of proof. Colorado has transformed a factual circumstance into a rule of law which reverses the recognized principles of this Court and requires the downstream state to bear the burden of proof regardless of the alignment of the parties. This is contrary to the Court's precedents placing the burden of proof in original actions on the plaintiff. In essence what the Court has done is to require the plaintiff state that is seeking to control conduct or to affect rights in another sovereign to justify its contentions. The purpose for this is clear. The Court is reluctant to allow one state to jeopardize existing interests in another.

In this case Colorado is required to prove two things: an equitable right to Vermejo water given the historical use made in New Mexico from the river, and that there is sufficient water to satisfy Colorado's proposed diversion without injury to New Mexico's uses. Because original actions over interstate water have involved suits by the downstream state to enjoin uses upstream, Colorado asks this Court to reverse the traditional standard of burden of proof and to analyze this case as if the defendant had the burden of proof despite the fact that the plaintiff, Colorado, seeks to curtail existing rights to Vermejo water in New Mexico. The significance of Colorado's argument is obvious. It suggests to the Court that a review of the record and of the evidence is irrelevant.

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[3] *Kansas v. Colorado*, 206 U.S. 46 (1907); *Wyoming v. Colorado*, 259 U.S. 419 (1922); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931); *New Jersey v. New York*, 283 U.S. 336 (1931); *Washington v. Oregon*, 297 U.S. 517 (1936); *Nebraska v. Wyoming*, 325 U.S. 589 (1945). All were suits by downstream states with interests that were perceived as threatened by diversions in upstream states. *Colorado v. Kansas*, 320 U.S. 383 (1943), was the final phase in litigation between Kansas and its appropriators and Colorado over the waters of the Arkansas River. It was essentially an action in the nature of a bill of peace to end litigation which had proceeded intermittently for nearly forty years.

The burden of proof in original actions is simply stated. The burden of proof rests upon the complainant state, and must be satisfied by a standard that is much greater than that required to be borne by private parties. It was expressed in the case of *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923) in this way:

> In such action by one State against another, the burden on the complainant State of sustaining the allegations of its complaint is much greater than that imposed upon a complainant in an ordinary suit between private parties. "Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence." *New York v. New Jersey*, 256 U.S. 296, 309; *Missouri v. Illinois*, 200 U.S. 496, 521.

In two of the cases cited by Colorado, *Kansas v. Colorado*, 206 U.S. 46 (1907), and *Connecticut v. Massachusetts*, 282 U.S. 660 (1931), the downstream states were plaintiffs who had initiated actions designed to affect the use of water in upstream states with whom they shared the waters of interstate streams. In both cases the burden of proof was critical. In both cases the Court's opinion was based upon its evaluation of the extent to which that burden had been satisfied. In *Kansas v. Colorado*, the Court dismissed the bill filed by the State of Kansas on the grounds that Kansas had not proved the allegations in her complaint by a standard sufficient to restrain existing uses in Colorado. 206 U.S. at 117-118. In *Connecticut v. Massachusetts*, where Connecticut was seeking to enjoin proposed diversions in Massachussetts, the Court measured Connecticut's allegations entirely with respect to the standard of proof required of plaintiffs in original actions:

> The governing rule is that this Court will not exert its extraordinary power to control the conduct of one State at

> the suit of another, unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence. *New York v. New Jersey*, 256 U.S. 296, 309. *Missouri v. Illinois*, 200 U.S. 496, 521. The burden on Connecticut to sustain the allegations on which it seeks to prevent Massachusetts from making the proposed diversions is much greater than that generally required to be borne by one seeking an injunction in a suit between private parties. *North Dakota v. Minnesota*, 263 U.S. 365, 374. 282 U.S. at 669.

Connecticut's bill was dismissed without prejudice to her right to maintain a suit against Massachusetts when it should appear that her substantial interests were being injured. 282 U.S. at 674.

In *Colorado v. Kansas*, 320 U.S. 383 (1943), the State of Colorado filed an original action to enjoin Kansas or Kansas appropriators from suing Colorado over waters of the Arkansas and to confirm the rights of the two states as determined by the judgment in *Kansas v. Colorado, supra*. The Court granted Colorado the relief that it sought. In determining that Colorado had met its burden of showing injury to its interests, the Court affirmed its reluctance to disturb existing developments based upon water use in another state. The Court held:

> On this record there can be no doubt that a decree such as the Master recommends, or an amendment or enlargement of that decree in the form Kansas asks, would inflict serious damage on existing agricultural interests in Colorado. How great the injury would be it is difficult to determine, but certainly the proposed decree would operate to deprive some citizens of Colorado, to some extent, of their means of support. It might indeed result in the abandonment of valuable improvements and actual migration from farms. Through practice of irrigation, Colorado's agriculture in the basin has grown steadily for fifty years. With this development has gone a large investment in canals,

> reservoirs, and farms. The progress has been open. The facts were of common knowledge. 320 U.S. at 394.

The error of Colorado's argument is clearly apparent by comparison with the facts in *Washington v. Oregon*, 297 U.S. 517 (1936). In that case, as in this, a suit to apportion the water of an interstate stream that was fully appropriated by the defendant state had been filed on the theory that the established uses of the defendant constituted a deprivation of the plaintiff's right to interstate water. The Court recognized that "[b]efore this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence." 297 U.S. at 522. In a situation not unlike that at issue here, the Court found:

> The case comes down to this: The court is asked upon uncertain evidence of prior right and still more uncertain evidence of damage to destroy possessory interests enjoyed without challenge for over half a century. In such circumstances an injunction would not issue if the contest were between private parties, at odds about a boundary. Still less will it issue here in a contest between states, a contest to be dealt with in the large and ample way that alone becomes the dignity of the litigants concerned. 297 U.S. at 529.

In this case, Colorado is attempting to accomplish what the Court denied to Washington. Colorado's position is urged without any evidence of prior right on the inaccurate contention that the defendant must bear the burden of showing non-injury. The Court must not be misled. Colorado failed either to establish that she has an equitable interest in the Vermejo that will justify out-of-priority diversions of 4,000 acre-feet per year or to present clear and convincing evidence that such out-of-priority diversions would not result in injury to existing uses in New Mexico.

Point II

COLORADO'S HYDROLOGICAL DESCRIPTION OF THE VERMEJO SYSTEM IS MISLEADING.

A premise of New Mexico's Brief in Support of Exceptions to the Report of Special Master is that average annual flows are not reliable evidence for evaluating the divertible supply of water available for use by appropriators in New Mexico. (New Mexico Brief at 32-34, 40-42). Divertible supply must be determined by consideration of monthly flows at the very least. As the Court has recognized, evidence composed of average annual flows like those contained in Colorado's Exhibit No. 5 is inherently deceptive because it does not reveal when water was present in the river or whether it was available in a form that is usable by owners of direct-flow water rights. (New Mexico Brief at 40-42). Of equal importance in this case is that the use of average annual flows by Colorado disguises the existence of chronic water shortages in the system. In accepting the conclusions urged by Colorado in Plaintiff's Exhibit No. 5, the Special Master has erred by adopting as the basis for his Report data which are hydrologically inaccurate. The result is legally indefensible.

Colorado states in its brief that "[w]hile New Mexico raises the question of 'dependable flow,' it never answers that inquiry, or suggests what might be a proper basis for resolving the question." (Colorado Brief at 68). In fact, New Mexico discussed this issue at length in argument before the Special Master and in supporting briefs. (Tr. at 1263, 1379; New Mexico Trial Brief at 43-47; New Mexico Reply Brief at 54-56). In this case, Colorado's use of average annual figures has had two results: the amount of water available for diversion by New Mexico users was distorted, and the drought conditions experienced by New Mexico appropriators was effectively hidden.

The dependable supply of water in the Vermejo is produced by the snowmelt runoff from the high elevation drainage area which flows down the river at a reliable rate during the early irrigation season. This water is produced in the Vermejo tributaries in Colorado during the spring and early summer. The amount of water produced in Colorado was shown to consist of 5,500 acre-feet by New Mexico's Exhibit No. F-20, the figures for which were tabulated in Exhibit No. F-36.[4] These exhibits constitute a determination based upon twenty-nine years of U.S.G.S. published streamflow data from the Vermejo River and four watersheds contiguous to the Vermejo drainage. The exhibits show the water produced within Colorado and relied upon by appropriators in New Mexico. Colorado has incorrectly stated that New Mexico relied upon records from "other drainages." (Colorado Brief at 5). In contrast, Colorado produced a figure of 8,400 acre-feet. (Colorado Brief at 4, 46; Plaintiff's Exhibit No. 5, Tbl. 4). This estimate was adopted by the Master. (Report, p. 3). Colorado represented to both the Special Master and to the Court that this figure is derived from "actual measurements" taken at three locations on Vermejo tributaries within Colorado over a four-year period. (Colorado Brief at 4). At most they are partial measurements conducted over a three-year period on the basis of questionable measuring techniques. The flumes installed by C.F. & I. were not calibrated by the U.S.G.S., nor were the records reviewed or published by the U.S.G.S. or the State of Colorado. (Tr. at 90-91). For some months, no measurements were taken at all because the flumes were washed out. (Tr. at 92). For several months one flume was installed incorrectly. No records were obtained during the winter months. (Tr. at 92). As a consequence, Colorado had to make

[4] New Mexico's Exhibit F-20, described as an altitude-runoff relationship, is a procedure which relates the mean elevation for a drainage basin with the known discharge from that basin. Several contiguous drainage basins are used to describe a relationship from which the discharge from a basin may be determined using the mean elevation of that particular basin.

correlations with the flow of Cucharas Creek, a drainage area to the north to obtain an estimate of flow in the three-year period 1977-1979. This is considerably less than "actual measurements" for the period discussed. This correlated flow was then correlated again with published U.S.G.S. figures from the gage on the Vermejo at Dawson, New Mexico, to obtain an estimate of the flow produced in Colorado over a 25 year period.[5] The result was a correlation based on incomplete and faulty data containing one other highly tenuous correlation.

Colorado's estimate is thus flawed in two critical respects. During trial in Santa Fe, data derived from New Mexico's altitude-runoff relationship was compared to Colorado's estimates of streamflow in the tributaries at the state line. (Tr. at 1248-1251). The comparison revealed that the total production of water from the Little Vermejo Creek at the state line computed by Colorado was comparable with data obtained in New Mexico's altitude-runoff relationship, but that the flows estimated by Colorado for Ricardo Creek at the state line exceeded New Mexico's figures by approximately 3,600 acre-feet per annum. There are three explanations for this. The first is the paucity of actual measurements obtained by C.F. & I. Secondly, with only sixteen months of record Colorado built a three year record of flow on the Vermejo by correlation with Cucharas Creek. (Tr. at 188). Thirdly, using these three years of correlated record, Colorado then constructed twenty-two years of record for Vermejo flows at the state line by another correlation with the Vermejo at Dawson.[6] (Tr. at 201). In other words, Colorado produced a twenty-five period of flow of the Vermejo at the state line from two correlations using, in one of them, a very short period containing three years of correlated record.

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[5] The 25 year period presented to the Special Master was 1955-1979 (Plaintiff's Exhibit No. 5, Tbl. 4); in Colorado's brief before this Court, the period was altered to 1956-1980. (Colorado Brief at 5).

[6] It would be fortuitous, at the most, if the three year period used during trial (1977-1979) of correlated record encompassed the range of flows over a 25 year period of record.

On the basis of this unreliable computation Colorado argues that the Special Master's recommendation would result in Colorado taking only "about one-half, (of water produced in Colorado) i.e., approximately one-fourth of the Vermejo River virgin flow." (Colorado Brief at 6). Using New Mexico's analysis, Colorado would be taking 73% of the 5,500 acre-feet of water produced in Colorado that is essential for New Mexico's appropriators.

In previous equitable apportionment decisions, the Court has comprehended the distinction between average annual flows and divertible supply in a way that is directly applicable to the Vermejo. This distinction is fully supported by the testimony of New Mexico's farmers.

The Court has repeatedly held that to ignore the dry years in the record will not produce an estimate of a dependable yield, but rather an estimate of water supply that may never materialize. *Wyoming v. Colorado*, 259 U.S. 419, 471, 476 (1922); *Colorado v. Kansas*, 320 U.S. 383, 396-397 (1943); *Nebraska v. Wyoming*, 325 U.S. 589, 620 (1945).

In *Colorado v. Kansas, supra*, the Court described the "critical matter" as "the amount of divertible flow at times when water is most needed for irrigation. Calculations of average annual flow, which include flood flows, are, therefore, not helpful in ascertaining the dependable supply of water usable for irrigation." 320 U.S. at 396-397. The Court has drawn a clear distinction between "divertible flow" during the irrigation season and "average flow" which also reflects a surplus of water during times of flood and the late summer months when it is largely unusable for direct flow irrigation. The use of averages will simply not disclose whether the water was there when it was needed; the point was emphasized further by the Court in *Wyoming v. Colorado:*

> Colorado's evidence, which for convenience, we take up first, is directed to showing the average yearly flow of all

> years in a considerable period, as if that constituted a proper measure of the available supply. We think it is not a proper measure, and this is because of the great variation in the flow. (259 U.S. at 471).
>
> Crops cannot be grown on expectations of average flows which do not come, nor on recollections of unusual flows which have passed down the stream in prior years. Only when the water is actually applied does the soil respond. (259 U.S. at 470).

Colorado's evidence of New Mexico's divertible supply consisted entirely of average annual flow. (Plaintiff's Exhibit No. 5, Tbls. 2 and 10). As stated in the Reply Brief, Colorado concludes that the "average annual flow" for the entire period of record at the Dawson gage is 12,919 acre-feet. (Colorado Brief at 3).

New Mexico's evidence displayed the fact that New Mexico's direct-flow appropriators (those who divert directly from the flow of the river) were unable to utilize flood waters contained in Colorado's evidence. As one user, Mr. Pompeo, testified:

> A. I heard a lot about amount of water since yesterday flowing down the Vermejo River, small amount, large amounts, average amounts. In my operation it's a direct flow thing and I cannot use flood waters.
>
> I'm talking about debris-filled, sandy type of water. This ruins my fields, does more damage than I can get out of it.
>
> Q. You are saying flood waters are this kind of water, contain debris and sand?
>
> A. Yes. (Tr. at 2199).

It was therefore our objection to Colorado's evidence that its studies presented to the Special Master were composed entirely of average annual flows that created the impression that there was sufficient water to satisfy New Mexico's appropriations by distorting the amount of water available for use in New Mexico. Although the Special Master has acknowledged that average annual flow data is not helpful in determining the availability of a dependable supply, (Report, p. 19), his Report has adopted Colorado's evidence by stating that there is sufficient water available for diversion by Vermejo Park Corporation, Kaiser Steel, and Phelps Dodge after diversions in Colorado. This is clearly in error. New Mexico's evidence showed that the consequence of diversions in Colorado would have a detrimental impact upon the water available for diversion in New Mexico and would further exacerbate the historic shortages of the water users in New Mexico. With respect to the Vermejo Conservancy District, an award of water to C.F. & I. in Colorado "could well spell the end of their farming operations." (Tr. at 1381). In addition, the consequence of a taking by C.F. & I. from the upper tributaries of the Vermejo River "can effect at least water users as far downstream as Ute Reservoir" on the Canadian River. (Tr. at 1382). *See* New Mexico Brief at Point II.

The issue of annual average flows is equally important in that average flows fail to show the existence of shortages and drought like that experienced on the Vermejo since the early 1970's. While both New Mexico's technical exhibits and the testimony of the water users provide conclusive evidence of drought conditions, that evidence is hidden by Colorado's use of average annual figures.

Defendants' Exhibit No. F-30, which relies upon Colorado's own figures for water production in Colorado, indicates that any diversions in Colorado during periods of low flow will result in

shortages to Kaiser Steel and Vermejo Park Corporation.[7] Defendants' Exhibit No. F-37 shows that the Vermejo Conservancy District has historically received only 57% of the water supply necessary to irrigate its project acreage. Defendants' Exhibit No. F-31 shows that annual shortages to the Arch Hurley Conservancy District on the Canadian River average 19% of the irrigation demand.

More importantly, however, the testimony of New Mexico's farmers provides unequivocal evidence of shortage beginning in the early 1970's. Mr Carl Odom testified:

> Q. In your experience with farming and ranching in this region have you noticed there has been a decline in Vermejo River waters?
>
> A. Yes, sir, there has been.
>
> Q. When has that been?
>
> A. It started in the early '70's, and after the flood in '65.
>
> Q. If you were able to irrigate the full amount of acres for which you have a water right which is 264 acres, would you do so?
>
> A. Yes, sir. (Tr. at 2214).

Mr. Jiggs Porter testified that in "the last few years it (the Vermejo) seems to be decreasing steadily." (Tr. at 2179). He testified that it is occasionally dry in places. (Tr. at 2178). Mr. Joe Armijo testified to decreasing flows in the Vermejo in the early 1970's in contrast to those he observed when he was first employed on the Vermejo Park Corporation property in 1963. (Tr. at 2124, 2129). Mr. Joe Pompeo testified to shortages that he experienced. (Tr. at 2202). Mr. Leonard Knox of the Vermejo Conservancy District Board of Directors testified to the

[7] This is confirmed by New Mexico's Exhibit No. A-130, the seepage investigation, which demonstrates that 94% of the water in the Vermejo River at York Canyon comes from the Colorado portion of the drainage. (New Mexico Brief at 35).

shortages experienced by the farmers of the District. (Tr. at 1810-1812). This is the testimony the Master should have considered. It provides direct evidence of shortage from those with experience of farming from the Vermejo.[8]

Colorado's hydrological evidence fails to provide an accurate picture of the Vermejo River. The evidence presented by Colorado at trial inflates the dependable flow at the state line, confuses divertible supply of water with average discharge and masks the existence of chronic shortages. The picture that is derived from this evidence is intended to convice the Court that the Special Master's recommendation will not be injurious to New Mexico. In sum, Colorado's analysis was not scientific, but rather self-serving and selective; not empirical and deductive, but rather the product of utilizing only those facts which would support a pre-conceived conclusion.

Point III

COLORADO HAS DISTORTED THE FACTS OF WATER USE FROM THE VERMEJO RIVER IN NEW MEXICO.

Colorado's description of historical water use and existing requirements for Vermejo water in New Mexico contains distortions of the record that are misleading to the Court. If not corrected, they would provide the basis for a decision that is contrary to the evidence and destructive to existing property interests in New Mexico. Throughout this case, Colorado has sought to convey the impression that New Mexico interests are wasteful and inefficient and have deliberately declined to use available water to satisfy their decreed rights. In the brief filed

[8] Colorado's suggestion that New Mexico's farmers were untruthful in their testimony of shortage and water supply, (Colorado Brief at 75), is scandalous. New Mexico's farmers are individuals with years of experience on the river. Colorado's witnesses have only a brief and academic familiarity with the Vermejo.

before this Court on May 7, Colorado's argument took the form of describing the inchoate right decreed to C.F. & I. as the equal of actual uses of nearly 100 years standing in New Mexico, and of misstating the extent and nature of New Mexico's rights.

The basis of Colorado's argument with respect to the conditional right decreed to C.F. & I. on May 12, 1975, is found on pages 7-8 of its Reply Brief. It is asserted that this right is owned by a "Colorado appropriator" and that its exercise would help alleviate water shortages by being used for a variety of purposes in the Purgatoire Valley. Two points should be made. First, Colorado has used the word "appropriator" in error because there are no appropriations of Vermejo water to beneficial use in Colorado. (Report, p. 17,21). The conditional right decreed to C.F. & I. in 1975 has never been exercised. (Tr. at 570-573, 2788, Report, p. 17,21). Although Colorado has described diversion points on the Vermejo within Colorado as though they existed, (Colorado Brief at 6), these are merely decreed diversion points, unlike those in New Mexico which exist on the stream. (Tr. at 91).

No use for which the water would ultimately be applied in Colorado exists at this time. With the exception of the interim agricultural purpose, each is a proposed, future use. At the time C.F. & I. first applied for a water right, these proposed uses were considered too speculative and uncertain by the water court and resulted in the denial of C.F. & I.'s application. (Tr. at 731-732).

> (Mr. Simms) On page 32 of your deposition in this regard you answered my question — let me read the question, "All of those that we have listed," uses, I mean, "as far as I understand, do not now exist; the coal washery, for instance, does not"?
>
> In answer you said, "The coal washery does not, the power does not presently exist; the residential, the domestic, as

such, does not presently exist; the synthetic fuel picture, that, of course, does not exist as the present (sic) day requirement." (Tr. at 784).

* * *

(Mr. Adkins) So in answer to your question, today at this moment, the situation is as I stated there, the coal washery does not exist, the domestic use does not exist, the sawmill operation is not on line today, and therefore, at this immediate moment, the only use would be agricultural. (Tr. at 785).

While C.F. & I. intends to apply water to its agricultural property in the Purgatoire, that would be strictly an "interim use." (Tr. at 745). The Ricardo project could not be justified by that use:

(Mr. Adkins) I believe in my deposition you raised a somewhat similar question, and I believe I stated to you that if we were depending on the income from agricultural operations, there is no way in the world that you could justify or amortize the cost of this project. (Tr. at 762).

C.F. & I.'s interest as represented by the conditional right is therefore one that is in the nature of future developments unsupported by present uses. The reality that lies behind the exhibits and the rhetoric is this: nothing currently exists except an agricultural use that will not justify the cost of the project. Colorado comes to this action without existing uses from the Vermejo on behalf of one citizen, the C.F. & I. Steel Corporation, which has only anticipated uses for Vermejo water. Colorado's entire purpose in describing the owner of an unexercised conditional right as an "appropriator" is transparent. In equitable apportionment actions between western

states, the Court has not considered future or prospective uses as equities. (New Mexico Brief at Point I). Indeed, the Court has held that *"the interests of the State are indissolubly linked with the rights of the appropriators." Wyoming v. Colorado*, 259 U.S. 419, 468 (1922), emphasis added.

Secondly, the problems of the Purgatoire Valley have no bearing in this action. The Purgatoire Valley is not within the drainage of the Vermejo River. It lies adjacent to it, across the drainage divide. It therefore has played no role in the development of water use on the Vermejo. The water which C. F. & I. proposes to use would be transported to the Purgatoire by means of a transmountain diversion. While it is clear that shortages exist on the Purgatoire, they have no relevance to the Vermejo, which must contend with shortages of its own.

Although Colorado has sought to create a basis in equity for diverting Vermejo water into the Purgatoire system, (Colorado Brief at 47-48), to sustain "an existing economy beset by chronic water shortages," the shortages experienced in the Purgatoire result from the lack of responsible water regulation by Colorado officials. Contrary to New Mexico, where a showing of available water is necessary to effectuate a new appropriation of water, Sections 72-5-1; 72-12-3 (N.M.S.A. 1978), in Colorado no such requirement exists. (Tr. at 594-596). The consequence is that there is a proliferation of paper rights in Colorado which bear little relationship to the hydrology of the rivers. This is demonstrated on the Purgatoire by Colorado's Exhibit No. 14-5 and the testimony of Dr. Danielson, the Colorado State Engineer, who stated that demand exceeds the supply on the Purgatoire 99.5% of the time. (Tr. at 534). Stated differently, "at least 50 percent of the time," [the Purgatoire] "is overappropriated 800 percent." (Tr. at 537). There is no basis in equity to require New Mexico to compensate for this system of

water administration. Indeed, it would be highly inequitable to do so. In addition, Colorado's argument is deceptive on its own merits. While Colorado argues that the Vermejo water would "augment existing supplies of these local entities" on the Purgatoire, (Colorado Brief at 49), under Colorado law the water would be foreign or imported water which C.F. & I. could fully consume without obligation to make return flows available to any other user. *City & County of Denver Bd. of W.C. v. Fulton Irr. D. Co.*, 179 Colo. 47, 506 P.2d 144 (1973).

Equally disturbing is Colorado's distortion of New Mexico's interests to minimize the acreage irrigated by existing New Mexico uses and to inflate the amount of water available for the District. The result appears to make water available for C.F. & I.'s proposed diversions. The data assembled in the table on page 9 of Colorado's brief are not consistent. In the column headed "Acres-Irrigated" the numbers for Vermejo Park (250) Phelps (150) Pompeo (50) Porter (14) and Odom (113) are Colorado's estimates of the acreage irrigated by these entities which reflect the drought conditions of the 1970's. These estimated acreages are considerably less than those decreed in *Phelps Dodge Corp. et al. v. W. S. Land & Cattle Co.* (Colfax County Cause No. 7201, 1941). The numbers for Messick (48.4) and Vermejo Park (46.73) are the acreages decreed in *Phelps Dodge, supra.* The number for the Vermejo Conservancy District (4,379) is the average acreage irrigated taken from the Bureau of Reclamation annual statistical report summarized in Defendants' Exhibit F-37. The numbers in the column headed "Amount of Water" for all the irrigation entities except the Vermejo Conservancy District consists of the acreage listed in the first column multiplied by 2. The source of the number 2 is apparently the decree in *Phelps Dodge, supra,* which fixes a duty of water (applied on the land) of 2 acre-feet per irrigated acre.

However, for the Vermejo Conservancy District the number given for amount of water is Colorado's estimate of the average annual amount of water diverted to the District at its diversion points, 14,535 acre-feet. In other words, for each of the other irrigation users Colorado has made a computation for water delivered on the land, but for the District Colorado has made a computation for diversion from the river thus attempting to inflate the amount of water available to the District by comparison with the other users.

The first diversion in New Mexico is made by the Vermejo Park Corporation. Colorado states that Vermejo Park Corporation irrigates only 250 acres of land (Colorado Brief at 9,67), and that this "was by choice, not the result of water limitations." (Colorado Brief at 67). Reference is made to two places in the testimony of Mr. Jim Charlesworth, the Manager of the property — Tr. at 2068, 2097. In neither instance did Mr. Charlesworth describe the irrigation of the 250 acres at Vermejo Park as being "from choice." On the contrary, he testified that this amount of acres was irrigated as a result of drought conditions over which he had no control. He specifically testified at trial of his efforts to irrigate more property, (Tr. at 2084), and that he would irrigate all 870 acres if water were available. (Tr. at 2077-2079).

> Q. Why aren't you irrigating more acres?
>
> A. Well, as I have repeatedly stated, each year in a majority of the years since Pennzoil has owned Vermejo Park, since Vermejo Park bought the property, we have tried to develop additional acreage to grow the crops that are necessary for us.

> We can get one watering on them, but the predictability of getting another watering on them or two more waterings on them is nearly impossible. It has proven impossible. (Tr. at 2077-2078).

Colorado states that the Kaiser Steel use has been no more than 361 acre-feet, that occurred in 1976, and that since then the use has actually decreased. (Colorado Brief at 11). Colorado states that Kaiser's witness, Mr. Taylor indicated uncertainty as to whether Kaiser would increase their operation beyond its current size. (Colorado Brief at 10). In fact, Mr. Taylor testified to exactly the opposite:

> We are constantly, just like everybody else, trying to expand our coal business. We know you can't expand without water to expand with.
>
> We have got rights that we are trying to utilize and utilize those to the fullest. We picked up rights through the same procedure we have gone through before, purchase these rights on the existing system, go through the State Engineer for approval, and we have rights in Springer to expand above roughly twice what we are doing now. (Tr. at 1746-1747).

This is supported by testimony of the minable reserves on Kaiser's property. (Tr. at 1750).

Colorado argues that the Vermejo Conservancy District is of such questionable validity that "it has paid virtually nothing on the principal and no interest on its indebtedness," (Colorado Brief at 12), and "continuously failed to make any appreciable payments on the over $2,000,000 indebtedness." (Colorado Brief at 57-58). In fact, the District has made payments on its indebtedness. Payments were made in 1966, 67, 68, 69, 70, 71, 72, and 73. Partial payments were made in 1974 and 1975. (Tr. at 1519).

Colorado argues that the Vermejo Conservancy District irrigated an average of 4,147.4 acres per year for the years 1970 through 1979. (Colorado Brief at 66). This is said to be "perhaps the most conclusive refutation of the contention by New Mexico that there wasn't enough water for the senior priorities of Phelps-Dodge and Vermejo Park Corporation to irrigate more than 150 acres and 250 acres respectively during the 1970's." (Colorado Brief at 66). The evidence shows that during the 1970's the acreage irrigated by the District ranged from a high of 6,662 acres to a low of 665 acres in 1977. By using an average figure for a ten year period, Colorado has disguised both drought conditions and availability of water in any given year. Colorado's use of average irrigated acreage is also deceptive with regard to the District's water supply.[9] The true measure of the District's water supply is in their annual water proration for water delivered to the farms. Defendants' Exhibit F-37 lists the District's water prorations for the period 1955-79. The drought for the 1970's is obvious in the District's annual water prorations.

Colorado has made the argument that injury to the District would be mitigated by the implementation of conservation measures. (Colorado Brief at 53-55). Colorado computes that a total of 2,000 acre-feet would be saved by the District, offsetting the effects of diversions of 4,000 acre-feet in Colorado. (Colorado Brief at 52). What Colorado does not describe is that the District has undertaken a study for a closed water system that would conserve water which would be used to relieve a portion of the chronic shortages which exist in the District. The testimony shows that approximately 600 additional acres could be irrigated

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[9] Colorado states that only an average of 3,575 acre-feet were actually applied to beneficial use on the District's lands. (Colorado Brief at 61). Colorado's own evidence shows that the amount applied to beneficial use was an average of 4,755 acre-feet (Colorado Exhibit No. 71). The contradiction is not explained, but Colorado has urged the lower figure on the Court to minimize the District's right.

with such a system. (Tr. at 2766). However, the effect of Colorado's argument would be to restrict the District to the irrigation of what Colorado has inaccurately computed to be the District's right, and to prevent it from irrigating the full 7,380 acres of project land.

Colorado maintains that any injury to New Mexico would be limited by a strict administration of the Vermejo by New Mexico water officials, (Colorado Brief at 51), who should "carry out their statutory duties to declare that rights upstream, or portions thereof, have been forfeited or abandoned." (Colorado Brief at 51). It is a basic tenet of New Mexico water rights administration that decreed rights are not subject to forfeitures or abandonment for drought conditions beyond the control of the users. *See, e.g., Chavez v. Gutierrez,* 54 N.M. 76, 213 P. 2d 597 (1950). As the evidence has shown, those conditions exist on the Vermejo. As explained by New Mexico's witnesses, there is ordinarily no need for constant governmental surveillance of water use in New Mexico. (*E.g.,* Tr. at 1063-1064, 2416-2417). While drought and shortage may make life difficult for water users, it is our experience that they can and do govern themselves. *Id.* When administrative intervention is needed, however, New Mexico law is more than adequate.

> Supervision of apportionment of water in accordance with licenses and court decrees is vested in the State Engineer. Sec. 72-2-9 (N.M.S.A. 1978). He may create or change water districts from time to time when necessary. Sec. 72-3-1 (N.M.S.A. 1978). Upon written application of a majority of water users in a water district, the State Engineer appoints a watermaster who has immediate charge over the apportionment of water (under the general supervision of the Engineer) and he shall so appropriate, regulate, and control the waters as to prevent waste. In the absence of such an application, the State Engineer may

appoint a watermaster for either temporary or permanent service if local conditions require it. Sec. 72-3-2 (N.M.S.A. 1978). The watermasters are to report such information to the State Engineer as he may require, such as the adequacy or inadequacy of the water supply, and the State Engineer shall correct any errors of apportionments as may be needed. Sec. 72-3-5 (N.M.S.A. 1978). During the existence of an emergency, and only during such time, he may employ assistants to serve under a watermaster. Sec. 72-3-4 (N.M.S.A. 1978). Any person may appeal from the acts or decisions of a watermaster to the State Engineer and thence to the district court. Sec. 72-3-3 (N.M.S.A. 1978). [2 W.A. Hutchins, *Water Rights Laws in the Nineteen Western States*, 528 (1974)].

Intervention has not been needed on the Vermejo River. (Tr. at 2417). It is well known that New Mexico is "a state with some of the strongest laws and best enforcement in the arid West...." (Blundell, Wall St. J., May 1, 1980, at 1, col. 1).

Point IV

COLORADO'S DISCUSSION OF THE LAW OF EQUITABLE APPORTIONMENT IGNORES THE PRIMARY EQUITIES CONSIDERED BY THE COURT IN EQUITABLE APPORTIONMENT LITIGATION.

Colorado's discussion of the law of equitable apportionment is remarkable for its effort to establish an equitable basis for the Special Master's recommendation. New Mexico is criticized for relying on the principle of prior appropriation as the basis for decision in equitable apportionment actions between appropriation jurisdictions, (Colorado Brief at 14-15), and for

not discussing two eastern cases: *Connecticut v. Massachusetts*, 282 U.S. 660 (1931) and *New Jersey v. New York*, 283 U.S. 336 (1931). (Colorado Brief at 24). In the first instance, our argument is based upon the Court's "guiding principle" as enunciated by Justice Douglas in *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945). This is entirely appropriate as it provides the most equitable result. In asking the Court to consider priority of appropriation as merely one of many considerations, Colorado asks the Court to minimize the one factor that most clearly reflects the economic and social reliance that results from the appropriations of water in the western states and which creates equities that the Court has sought to protect.

In both *Connecticut v. Massachusetts, supra*, and *New Jersey v. New York, supra*, the Court's basis of decision sheds little light on the facts in issue here. Both cases reflect a dispute between riparian jurisdictions over unappropriated water. In neither case can Colorado cite precedent which is applicable to the Court's analysis of equities in apportionment actions between western states over fully appropriated streams.

Colorado provides a list of considerations derived from "a composite of the various equitable apportionment cases" on pages 30-32 of its brief. They are the result of misconstruing the holdings in the leading cases. We will examine each principle, and show how the facts and holdings of the cited cases do not support the proposition for which Colorado has used them. We will then restate the principle to properly summarize the Court's holdings in the cases.

A. One state will not be permitted to command the entire flow of an interstate stream "regardless of need or use." *Kansas v. Colorado*, 206 U.S. 46, 85, 101-102; *Connecticut v. Massachusetts*, 282 U.S. 660, 669-670; *New Jersey v. New York*, 283 U.S. 336, 342; *Washington v. Oregon*, 297 U.S. 517, 523, 526; *Colorado v. Kansas*, 320 U.S. 383, 393.

This consideration is not even a factor in the cases from which it is supposedly derived. The decision in both *Kansas v. Colorado, supra,* and *Colorado v. Kansas, supra,* resulted from a balancing of actual equitable interests derived from the use of water on opposite sides of a state boundary. There were existing uses in both states with interests dependent on the flow of the river. The decisions in *Connecticut v. Massachusetts, supra,* and *New Jersey v. New York, supra,* were based on the presence of available water and the lack of demonstrable injury to the plaintiff state. Neither factor exists in this case. Properly stated, the principle should read: A downstream state will not be permitted to command the entire flow of an interstate stream if its waters might be appropriated by an upstream state without injury to existing uses in the downstream state. When stated this way, *Kansas v. Colorado, Connecticut v. Massachusetts, New Jersey v. New York,* and *Colorado v. Kansas, supra,* would support the principle — in essence it was the holding in each case.

The fifth decision, however, *Washington v. Oregon, supra,* supports neither statement because of a critical difference in the facts that generated the dispute. Indeed, as Colorado states the principle, *Washington v. Oregon* not only does not support it, but to the contrary, stands for the opposite proposition, i.e., with respect to the Tum-a-Lum and Mill Creeks, one state did and could, according to the Court, command the entire flow of an interstate stream despite Washington's alleged need.[10] When the

[10] Colorado tries to evade the decision in *Washington v. Oregon* by urging that the Court decided the case on the basis of a "futile call," that is, the water of the Tum-a-Lum never would have reached the Washington users. (Colorado Brief at 28). Colorado misstates the case, however. As an evidentiary matter, the Master found that "(t)here is no satisfactory proof" except "(d)uring the period of water shortage, [when] only a small quantity of water would go by if the dams should be removed." 297 U.S. at 522-523. At times other than times of shortage, however, the problem was not a futile call at all, but rather one of laches or abandonment on the part of the Washington user, Gardena Farms, and estoppel against the State of Washington. 297 U.S. at 528-529.

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principle is stated so as to fit the other four cases, *Washington v. Oregon* still is askew because it dealt with fully appropriated waters. When read in light of its facts, it stands for three propositions: (1) under certain circumstances one state can command the entire flow of an interstate stream, (2) evidence of disinterest by a state over time in interstate waters will preclude the possibility of perfecting a claim to those waters, and (3) the lack of diligence on the part of a water user in asserting or maintaining his water rights may preclude a state from asserting them *parens patriae* in an equitable apportionment action.

> B. While priority of appropriation is a consideration, water can be apportioned to junior priorities even if such apportionment injures existing economies and senior priorities. *Kansas v. Colorado*, 206 U.S. 46, 113-114; *Wyoming v. Colorado*, 259 U.S. 419, 484; *Connecticut v. Massachusetts*, 282 U.S. 660; *Nebraska v. Wyoming*, 325 U.S. 621, 642-643.

As stated by Colorado the principle is supported by none of the cases cited. Properly stated, the principle should read: While priority of appropriation is the guiding principle in equitably apportioning interstate waters between prior appropriation states, water can be apportioned to protect an existing economy based on junior appropriations even if such an apportionment would injure senior priorities. Stated this way, the principle is supported by *Kansas v. Colorado*, *Wyoming v. Colorado*, and *Nebraska v. Wyoming*, *supra*. Each involved competition by existing economies on two sides of a state boundary for the water of an interstate stream upon which they were dependent. *Connecticut v. Massachusetts*, *supra*, which involved competing riparian jurisdictions, bears little relation to the principle stated either way.

When the principle is stated properly, it is apparent that the cases cited by Colorado gravely undermine her position. There is no economy dependent on the Vermejo in Colorado. Colorado has created the principle that it recited above to disguise this fact. In the facts of this case, a different principle is important: No state will be allowed to assert a future claim on behalf of one of its citizens on an interstate stream that historically has been fully appropriated in another state. *Nebraska v. Wyoming, supra, Washington v. Oregon, supra, Arizona v. California,* 373 U.S. 546 (1963). These cases not only support the principle we suggest is important here, they so hold.

C. Each state bordering an interstate stream must exercise her rights in an interstate stream reasonably and institute conservation or storage practices to conserve the common supply. *Wyoming v. Colorado,* 259 U.S. 419, 484; *Nebraska v. Wyoming,* 325 U.S. 589, 618.

On the Vermejo there has been no common supply because there has never been a use of Vermejo waters in Colorado. It remains true that each state on an interstate stream must exercise her rights reasonably and conserve the supply. What Colorado does not mention, however, is that states must conserve "within practicable limits . . . ." (*Wyoming v. Colorado, supra* at 484). With respect to storage, each state should regulate and equalize the natural flow also "within limits, financially and physically feasible . . . ." (*Id.* at 484). Both New Mexico and its water users have respectively exercised their water rights continuously and responsibly under conditions of shortage.

D. The law governing disputes between states is not the same as the law which governs the resolution of disputes between private citizens. *Kansas v. Colorado,* 185 U.S. 125, 136; *Connecticut v. Massachusetts,* 282 U.S. 660, 670; *New Jersey v. New York,* 283 U.S. 336, 343.

None of the cases cited supports this statement. If reworded to say that priority of appropriation will not be adhered to strictly in circumstances where a political boundary has allowed conflicting water demands to outdistance the supply, the principle would find support in *Wyoming v. Colorado, Nebraska v. Wyoming, Washington v. Oregon,* and *Arizona v. California, supra.* The western case that Colorado cites, *Kansas v. Colorado,* is inappropriate because Colorado is a prior appropriation jurisdiction and Kansas a riparian jurisdiction.

Colorado miscites *Connecticut v. Massachusetts,* and *New Jersey v. New York, supra,* which stand for the proposition that orthodox riparianism will not be allowed to stand in the way of reasonable diversions. In *New Jersey v. New York,* for instance, the Master proceeded as if a resolution of the controversy would be made easier if common ground could be found. He concluded, in this regard, that each of the three states involved in the litigation permitted municipalities to divert water for domestic needs at the expense of riparian users, that each of the states permitted transwatershed diversion, and that the common law of all three states allowed a reasonable diminution in flow by upstream proprietors. As is amply shown by his report, the Master in fact reached his decision by applying not "the common law of private riparian rights," which the Court deemed obsolete, but by applying the relevant law of water usage common to both states. (Special Master Report, *New Jersey v. New York,* at 37).

The real question here is whether there is any practical need or exigency to vary the application of prior appropriation that was the basis of the federal district court's decision in *Kaiser Steel Corporation et al. v. C.F. & I. Steel Corporation,* Civil No. 76-244 (D.N.M. 1978). The cases stand unequivocably for the proposition that priority is varied only where the social and economic conflict already exists. The Supreme Court has never manufactured the problem it is called upon to resolve in equitable apportionment actions. It is not the Court's job to make sovereigns collide.

E. A state may divert water from an interstate stream even if it has not done so previously. *Connecticut v. Massachusetts*, 282 U.S. 660; *New Jersey v. New York*, 283 U.S. 336.

The holding of both cases cited in support of the principle was that a state may make a new diversion of the waters of an interstate stream only when it will not injure other states sharing the common supply. (282 U.S. at 672; 283 U.S. at 345).

A slightly different principle is more appropriate here: A diversion for future use will not be allowed at the expense of existing rights. *Nebraska v. Wyoming* and *Arizona v. California, supra.* The obvious reason is that no practical need or exigency warranting a future diversion can exist on a fully appropriated stream. Under these circumstances, which prevail in the case at bar, present need for water in a different watershed is totally irrelevant to the equities governing the apportionment of the waters of the stream in question.

F. Priority of appropriation is but one of many considerations in an equitable apportionment proceeding. *Wyoming v. Colorado*, 259 U.S. 419; *Nebraska v. Wyoming*, 325 U.S. 589, 622.

Properly stated, the principle should read: As between priority of appropriation states, priority will always control an apportionment of claims for future uses at the expense of existing uses. *Nebraska v. Wyoming* and *Arizona v. California, supra.* In those circumstances where the social and economic conflict is past fact, Colorado still states the principle incorrectly. There it should read: Priority of appropriation is the guiding principle as between prior appropriation states, but it may be varied by the consideration of relevant factors in order to protect an economy based on junior appropriations. *Accord, Wyoming v. Colorado* and *Nebraska v. Wyoming, supra.* There is no economy in Colorado based upon uses from the Vermejo.

G. Physical conditions of the river, consumptive use, return flows, and other "countervailing equities" or "exigencies" which a state may present must be considered. *Nebraska v. Wyoming*, 325 U.S. 589, 622; *Kansas v. Colorado*, 206 U.S. 46, 113-114; *Connecticut v. Massachusetts*, 282 U.S. 660, 670.

Colorado has stated one principle correctly. However, to suggest that considerations of physical conditions of the river, consumptive use, and return flows are of any use in resolving this dispute is absurd. Those considerations were enumerated in *Nebraska v. Wyoming* as possible bases upon which to reasonably protect junior priorities; that object can be accomplished here simply by applying priority of appropriation, which is eminently fair and equitable under the circumstances. With respect to "countervailing equities" and "exigencies," Colorado can assert none. Her lack of the exercise of sovereign power over the Vermejo, her century long disinterest in the river, and her inaction in asserting any claim to Vermejo waters are strong equities in New Mexico's favor.

CONCLUSION

Colorado's position in this litigation consists of an effort to obtain water from the Vermejo River for future uses by the C.F. & I. Steel Corporation despite the existence of an economy dependent on Vermejo flows in New Mexico. To this end Colorado has sought to minimize the injury that diversions of 4,000 acre-feet per annum would cause to New Mexico's appropriators. Colorado has distorted the facts with respect to the availability of divertible water, the existence of shortage, and the requirements of New Mexico's users.

There is no economic dependence on the Vermejo River in Colorado. There have never been appropriations of Vermejo water to beneficial use in that state. In New Mexico, by contrast,

the evidence has displayed the existence of an economy of ranching, agricultural and mining uses which are wholly dependent on continued flows of the river, the priorities for which extend back to the 1860's. These uses are the foundation for the enterprise and the economic and social reliance which we are asking the Court to protect at equity.

The equity inherent in New Mexico's position is best reflected in the Court's recognition that a state's interest is "indissolubly linked with the rights of the appropriators," *Wyoming v. Colorado,* 259 U.S. 419, 468 (1922), and in the doctrine of prior appropriation as the "guiding principle" of decision. *Nebraska v. Wyoming,* 325 U.S. 589, 618 (1945). Colorado's fear of this principle reflects both on its lack of substantive equities in this lawsuit as well as on the credibility of its evidence. If Colorado believed that sufficient water was present in the Vermejo to satisfy both New Mexico's existing uses as well as C.F. & I.'s proposed diversion, this action would not have been brought. The company would simply have constructed diversion works and proceeded to divert water. C.F. & I. is not precluded from proceeding to appropriate water in accordance with the conditional decree of 1975, only from making diversions before the senior rights of New Mexico's users are satisfied. *Kaiser Steel Corporation et al. v. C.F. & I. Steel Corporation,* Civil No. 76-244 (D.N.M. 1978).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jay F. Stein, hereby certify that I am a member of the bar of this Court and counsel of record for the defendants and that on June 5, 1982, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be mailed the requisite number of copies of the foregoing Motion and Reply Brief, by first class mail, postage prepaid, to the following officials of the State of Colorado:

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Governor of the State of Colorado
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Denver, Colorado 80203

The Honorable J. D. MacFarlane
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I certify that on June 5, 1982, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be mailed the requisite number of copies of the foregoing Motion and Reply Brief, by first class mail, postage prepaid, to the following counsel of record:

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Mr. Robert F. Welborn
Assistant Attorney General
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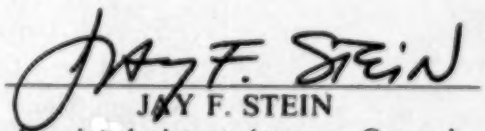
1100 United Bank Center
Denver, Colorado 80290

I certify that all parties required to be served have been served.



JAY F. STEIN
Special Assistant Attorney General

No. 80, Original

Office - Supreme Court,
FILED
JUN 24 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

THE STATE OF COLORADO,

Plaintiff,

v.

THE STATE OF NEW MEXICO,
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE
OF NEW MEXICO,

Defendants.

OBJECTION TO MOTION FOR LEAVE TO FILE REPLY BRIEF OF THE STATE OF NEW MEXICO

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June 18, 1982

No. 80, Original

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

THE STATE OF COLORADO,

Plaintiff,

v.

THE STATE OF NEW MEXICO,
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE
OF NEW MEXICO,

Defendants.

OBJECTION TO MOTION FOR LEAVE TO FILE REPLY BRIEF OF THE STATE OF NEW MEXICO

June 18, 1982

The State of Colorado through its Attorney General hereby objects to the Motion For Leave To File Reply Brief of the State of New Mexico. The reasons are as follows:

1. The briefing procedure in regard to exceptions to the Report of the Special Master was set by the order of this Court entered on February 22, 1982 as reported in the letter of the same date from the Clerk of the Court to the Honorable Ewing T. Kerr. That procedure called for exceptions to be filed by either party and for a response by the party opposing the exceptions. The order does not allow for the filing of reply briefs and is in accord with the procedure followed by this Court in prior original proceedings between states. See *Ohio v. Kentucky*, 410 U.S. 641 (1973).

2. This limitation seems designed to promote judicial economy by preventing repetitious argument over legal precedent and the import of the factual record. It recognizes this Court's ability to evaluate the legal and factual arguments with one original brief by a party or parties and one response to each brief. This limitation would require that each party fully set forth in its brief or response all of the legal and factual arguments in support of its position, holding nothing back for further reply.

3. New Mexico seeks to justify its extraordinary motion on the grounds, *inter alia*, that Colorado's Brief presents an erroneous legal theory based on an incomplete discussion of applicable precedent. Colorado submits that this Court is fully capable of analyzing the correctness of Colorado's legal theories.[1]

---

[1]The position of New Mexico is also being argued by Amici Curiae in their Brief.

4. New Mexico further argues that Colorado's brief has distorted the factual record with respect to certain matters. However, both Colorado's and New Mexico's briefs are replete with citations to the factual record from which this Court may independently evaluate the factual claims.[2]

5. New Mexico also argues that Colorado's extensive response to New Mexico's brief necessitates a reply so that this Court can fully appreciate the significance of the facts and law at issue in this case. When two sovereign states ask this Court to settle a dispute between them, the significance of the matters at issue is not taken lightly by this Court and New Mexico has no reason to believe otherwise.

6. Finally, New Mexico argues that a decision of this case based on the facts recited in Colorado's brief would be prejudicial to property rights in New Mexico. Colorado believes this Court is fully able to evaluate the conflicting factual claims without an additional brief by New Mexico.

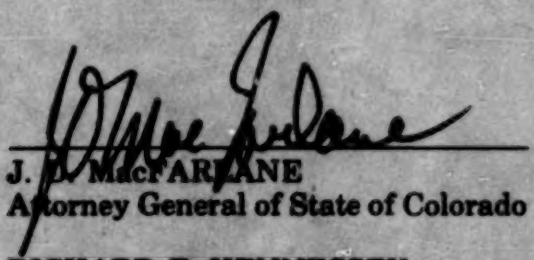
---

[2]Similar claims could be made of New Mexico's proposed Reply Brief. For example, in the very first paragraph, New Mexico attempts to rehabilitate one of its criticisms and misconstructions of the Special Master's Report by referring to canal loss figures of 35% to 60% for an average of 47½% (bottom of page 2 and top of page 3), citing its own witness' testimony at pages 1280 and 1315 of the transcript. Nowhere on those pages do those figures appear. The only use of the word "system" is at page 1315 and there the testimony is that losses from this system are 25% to 50% for an average of 37½%. Also illustrative is footnote 8 of New Mexico's proposed Reply Brief wherein it says Colorado, at page 75 of the Reply Brief of the State of Colorado, scandalously suggests that New Mexico's farmers were untruthful. No such statement was made nor can it fairly be inferred from Colorado's statement at that page: "Because the Special Master did not base his ruling upon certain portions of the record means only that other portions of the record were deemed more convincing. The Master was in the unique position to judge the credibility of the witnesses, as well as the weight to be given to their testimony. His conclusions are amply supported by the record."

7. The grounds urged by New Mexico in its Motion could justifiably be asserted by Colorado with regard to New Mexico's proposed Reply Brief and would entitle Colorado to file a sur-reply brief.

WHEREFORE, the State of Colorado respectfully requests this Court to adhere to its original order and deny New Mexico's Motion For Leave To File Reply Brief.

Respectfully submitted,



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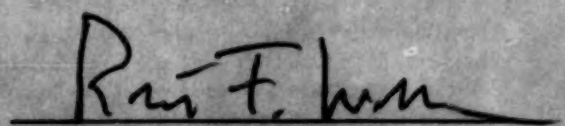

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CERTIFICATE OF SERVICE

I, Robert F. Welborn, hereby certify that I am a member of the bar of this Court and counsel of record for the plaintiff and that on June 23, 1982, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be mailed the requisite number of copies of the foregoing Objection To Motion For Leave To File Reply Brief of the State of New Mexico, by first class mail, postage prepaid, to the following officials of the State of New Mexico:

The Honorable Bruce King
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State Capitol
Santa Fe, New Mexico 87503

The Honorable Jeff Bingaman
Attorney General of the State of New Mexico
Department of Justice
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I certify that on June 23, 1982, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be served by Federal Express the requisite number of copies of the foregoing Objection To Motion For Leave To File Reply Brief of the State of New Mexico on the following counsel of record:

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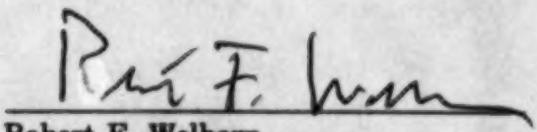

Robert F. Welborn
Special Assistant Attorney General

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APR 6 1982

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IN THE

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October Term, 1977

STATE OF COLORADO, *Plaintiff*

v.

STATE OF NEW MEXICO
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE OF
NEW MEXICO, *Defendants*

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

AND

BRIEF AMICI CURIAE OF KAISER STEEL CORPORATION, PHELPS DODGE CORPORATION, VERMEJO PARK CORPORATION AND VERMEJO CONSERVANCY DISTRICT IN SUPPORT OF THE POSITION OF THE STATE OF NEW MEXICO

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April 6, 1982

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v.

STATE OF NEW MEXICO
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE OF
NEW MEXICO, *Defendants*

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Come now Kaiser Steel Corporation, Phelps Dodge Corporation, Vermejo Park Corporation and Vermejo Conservancy District, and respectfully move the Court for leave to file the attached Brief as Amici Curiae in support of the position of the State of New Mexico, and state:

1. This motion is filed pursuant to Rule 36.3 of the Revised Rules of the Supreme Court of the United States.

2. These movants have requested that the parties consent to the filing of an amici curiae brief. New Mexico has consented, but Colorado has refused to consent.

3. The movants are the principal appropriators of the waters of the Vermejo River, having water rights adjudicated by the New Mexico court with priority dates ranging from 1867 to 1910. Movants apply the water to irrigation, industrial, domestic and recreational uses. There are not now and have never been any uses of the water in Colorado. Movants will suffer severe and irreparable injury if the

Report of Special Master on the Equitable Apportionment of the Vermejo River should be adopted by this Court.

4. Before these original proceedings were instituted, the movants, as private litigators, obtained a decree in the United States District Court for the District of New Mexico in Cause No. 76-244-P enjoining a prospective Colorado user, CF&I Steel Corporation, from diverting the waters of the Vermejo River and its tributaries, Ricardo Creek, Little Vermejo Creek and Fish Creek, out of its priority. Said cause has been appealed to the United States Court of Appeals for the Tenth Circuit where the appeal is still pending.

5. If this Court adopts the Special Master's report apportioning waters of the Vermejo River to Colorado out of the established priority, the implicit but direct effect will be to overrule nearly 80 years of precedents from this Court, from the lower federal court system, and from the state courts as to the applicable law of interstate stream disputes between appropriators in appropriation doctrine states.

6. In view of the importance of this cause to the movants, whose property rights would be destroyed by the adoption of the Special Master's recommendations, movants should be permitted to put their position before the Court by the proposed Brief which accompanies this Motion.

Respectfully submitted,

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No. 80, Original

IN THE

Supreme Court of the United States

October Term, 1977

STATE OF COLORADO, *Plaintiff*

v.

STATE OF NEW MEXICO
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE OF
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BRIEF AMICI CURIAE OF KAISER STEEL CORPORATION, PHELPS DODGE CORPORATION, VERMEJO PARK CORPORATION AND VERMEJO CONSERVANCY DISTRICT IN SUPPORT OF THE POSITION OF THE STATE OF NEW MEXICO

I. INTRODUCTION AND STATEMENT OF INTEREST OF THE *AMICI CURIAE*

A. *Amici Curiae.*

The *amici curiae* are the principal New Mexico users of the water of the Vermejo River, owning water rights adjudicated in a general stream adjudication in New Mexico in 1941. The Vermejo is a puny river, an insignificant creek by eastern or midwestern standards. But it is the lifeblood of Colfax County, New Mexico. The respective individual interests of the *amici curiae* are summarized as follows:

1. Phelps Dodge Corporation

Phelps Dodge Corporation owns irrigated land situated immediately below the Dawson Gauge. Its right to irrigate 501.19 acres (the equivalent of 1,002.38 acre-feet) is the oldest on the river, having a priority date of 1867. A total of 200 acres of these rights have been leased and administratively transferred to Kaiser Steel Corporation at its York Canyon mine. The remaining irrigated land is currently farmed by C S Cattle Company, whose lease obligates it to divert the necessary water for the irrigation and growing of crops and to do all things necessary to preserve Phelps Dodge's irrigation right. The lease reserves to Phelps Dodge the right to withdraw water from irrigation uses for industrial application.

Phelps Dodge diverts directly from the river. It has no storage facilities or storage right, and its ability to use water is necessarily limited by the quantity available in the stream from time to time during the irrigation season. In the arid climate of New Mexico, whose weather patterns vary markedly from year to year, successful irrigation depends upon the constant availability of water during the spring and early summer — months which are commonly low in rainfall and when mountain snow melt supplies the dependable base flow of the stream. On occasion, the Phelps Dodge right has called upon Vermejo Park Corporation to reduce its upstream diversion so as to permit water to reach the Phelps Dodge headgate.

2. Kaiser Steel Corporation

Kaiser Steel Corporation operates a substantial coal mine at York Canyon, a small Vermejo tributary located roughly halfway between the state line and the Dawson Gauge. Kaiser diverts primarily from a sump in the bed of

the Vermejo River for its coal mining activities, including dust suppression, coal washing, irrigation of reseeded areas, and some domestic purposes. In addition to the 400 acre-feet leased from Phelps Dodge, Kaiser Steel owns 230 acre-feet with priority dates of 1877, 1883 and 1887. These rights are in most respects senior to all other users except Phelps Dodge. Kaiser has no storage right and is completely dependent upon the daily availability of water in the Vermejo River. On various occasions it has made demand upon Vermejo Park Corporation to cease or reduce its irrigation diversions from the river. Kaiser Steel must rely upon the dependable flow of the river, and when that flow is unavailable, Kaiser Steel will have to shut down its plant. The cost of bringing water to York Canyon from the Cimarron River, the only other source conceivably available, is estimated at twelve million dollars.

3. Vermejo Park Corporation

Vermejo Park Corporation operates a cattle ranch on which it conducts farming operations and recreational activities between the state line and the Phelps Dodge property. Its decreed rights authorize it to irrigate 770.2 acres by direct diversion from the main stem of the Vermejo River with priority dates of 1873, 1876 and 1878. Vermejo Park has no storage rights on the main stem. Between 1963 and 1970 the ranch actively irrigated about 700 acres along the river. Subsequent to 1970 the supply of water in the river diminished appreciably, and priority calls were received from Phelps Dodge and Kaiser Steel, as a result of which the acreage actively irrigated has been temporarily reduced to approximately 250 acres. Recent efforts to replant and to restore some of the old fields to production have proved fruitless because of inadequate irrigation water to develop and maintain mature root systems.

4. Vermejo Conservancy District

The Vermejo Conservancy District is an entity organized under New Mexico law which represents more than seventy owners of irrigated lands in the District, among whom is included the United States' Maxwell Wildlife Refuge. The District has the right to divert and store water from the Vermejo River with priority dates of 1888, 1891, 1908 and 1910 and to irrigate lands served by its system. The decree permits the irrigation of 14,621.55 acres, all of which were under irrigation in 1941, but the District's repayment contract with the Bureau of Reclamation, made in connection with the rehabilitation and reconstruction of its diversion and storage facilities, specifies that water be applied to 7,380 acres, except in the event of excess water becoming available to the District. The District receives part of its water from the Chico Rico Creek, but all of its lands can receive water from the Vermejo diversion, and approximately 70% of its water supply is obtained from the Vermejo diversion dam and canal.

Although the water supply studies made by the Bureau of Reclamation and the Bureau's analysis of the repayment capacity of the Project showed that the rehabilitation project was feasible and that the water supply was adequate to insure repayment to the government of a specified portion of the cost, the District has experienced chronic shortages in all but two years since the completion of the rehabilitation project in 1955. The crops grown on the lands of the District have been sufficient to permit the payment of all operation and maintenance expenses, but the District has been unable to meet all of its scheduled repayment to the United States. Congress has acted to defer the repayment obligation, but not to cancel or discharge it.

B. Private Litigation.

The *amici curiae*, learning of CF&I Steel Corporation's plan to divert from the watershed up to 75 cubic feet per second of the dependable snow melt furnishing the base flows of the Vermejo River, commenced an action in the United States District Court for the District of New Mexico, seeking to enjoin CF&I from diverting out of priority to the detriment of the plaintiff water users. Both Colorado and New Mexico follow the doctrine of prior appropriation. There is not now and never has been a use of the Vermejo water in Colorado. The District Court granted summary judgment to the plaintiffs, applying the federal common-law doctrine of priority of appropriation. Its decree enjoined CF&I from making any diversions out of its priority. That judgment is presently on appeal to the Court of Appeals for the Tenth Circuit. When this action for equitable apportionment was thereafter filed by Colorado, the consideration of the appeal was stayed at the request of CF&I pending determination of Colorado's suit.

C. Detriment to Amici Curiae

The Special Master's report recommends that Colorado be permitted to divert 4,000 acre-feet annually (which is most of the dependable flow) from the headwaters of the Vermejo River, all of which is to be transported to the Purgatoire drainage where it is to be permanently lost to the Vermejo system. There is no limitation as to the time when the water may be taken, or as to the rate of taking. Obviously, this has the practical effect of awarding to CF&I the first priority on the river and is very detrimental to the senior New Mexico users whose century-old appropriations are thus arbitrarily subordinated to the demands of a not-yet-existing use in Colorado. The effects upon the

individual *amici* will not be uniform; however, it is evident that in periods of drought and low flows — and, indeed, in most periods — the already critical problems facing direct flow appropriators will be grossly exacerbated. And the effect upon the District will be utterly disastrous.

II. SUMMARY OF ARGUMENT

The Special Master misunderstood the evidence placed before him. He equated "average" flow in the river with dependable, predictable flow. He simply misread the evidence with respect to water available to, and the economic viability of, the small farming operations comprising the Vermejo Conservancy District. He totally misconceived the effect of his recommendations on these and the other totally dependent New Mexico users, who are presently and historically the only users on the river.

The Special Master misunderstood the doctrine of equitable apportionment. He believed that the doctrine required him to apportion water to Colorado despite there having been no use ever made of the water there, and he ignored decades of precedent to the contrary from this Court and other federal and state courts.

Where, as in this case, an original proceeding is pending with respect to an interstate stream between two states each following the doctrine of prior appropriation, where the stream has been for decades over appropriated in the one state with no present or historic use whatever in the other, the rule of equitable apportionment is the rule of prior appropriation. New uses will be permitted but only in their respective priorities of appropriation from the stream. Even were this Court to overrule decades of precedent and require considerations of "equities" in favor of

a non-existent use, none of the equities to which this Court has ever alluded in equitable apportionment cases exist here.

The result of the Special Master's misconceptions would be complete disaster to long existing, totally dependent economies in New Mexico.

III. ARGUMENT

A. The Special Master Misunderstood the Physical Evidence in the Case. The Consequence of the Error Is a Recommendation Which Is Grossly Inequitable

One must start any discussion of the impact of the Special Master's decision with the fate of the Vermejo Conservancy District, because even the Special Master concedes that Colorado's diversions will affect the District, a fact which he refuses to acknowledge, or simply does not perceive, with respect to the other New Mexico users. The Special Master justifies obliteration of the District by pointing out (a) the shortcomings of the Bureau of Reclamation Project in the 1950's and (b) the District's inability "to meet its debts and live up to its expectations . . ." (Report at p. 10). This latter statement overlooks one of the most important facts in this case. As the single largest user of Vermejo River water in New Mexico, the District has suffered chronic and severe water shortages since the completion of the rehabilitation of the District's works in 1955. New Mexico's evidence, specifically Exhibits F-22 and F-37, showed that over the period of 1955-1979 the shortage to demand averaged 56% (Tr. 1309-1311). This same evidence further showed that an award to Colorado of 3,650 acre-feet per annum would *alone* constitute a third of the already short historic supply available to the District over

the 1955-1979 period, a taking which New Mexico's expert witness testified would be "disastrous" to the District (Tr. 1326).

Secondly, the Bureau of Reclamation Project was not the beginning of farming in the Maxwell area as the Special Master somehow supposes. Farming by irrigation near the community of Maxwell has been a fact of life in Colfax County since 1888. For the Special Master to declare that the District has never been an economically feasible operation because the District is presently unable to meet a repayment obligation on a recent reclamation project totally ignores a long history of agricultural activity in the District well before the Bureau of Reclamation Project. Furthermore, the Special Master judges the feasibility of a reclamation *project* through the perspective of 20-20 hindsight, instead of addressing the almost one hundred years of the use of the *water*.

The evidence in this record shows that neither the Congress nor the agency in charge of reclamation projects, the Bureau of Reclamation of the Department of the Interior, authorized or recommended the rehabilitation of the District's works without a detailed and comprehensive evaluation of the Project's probable success in terms of its ability to repay the United States Government. The Bureau's Chief Executive Officer for the Southwest Region emphasized in his testimony before the Special Master that (a) the Bureau's studies in the late 1940's and 1950's indicated the existence of an adequate water supply for the Project from both the Vermejo and the Chico Rico Creek; (b) the Project users would have the ability to repay the Government over the usual 75 year period of time; and (c) the Project was deemed feasible by both Congress and the Bureau at the time it was authorized (e.g. Tr. 1508-

1513). No one foresaw at the time the drought cycles of the 1950's and 1960's and particularly the 1970's which struck this region of New Mexico as well as many others (including the Purgatoire in Colorado) resulting in a sharply diminished water supply for the Project. For the Special Master to state now some 30 years after the Project was authorized that "[i]t should have never been built . . ." reflects an insensitivity to the efforts of the area's farmers to live with a chronic shortage of water and of those government officials who have attempted to overcome the District's problems.

Contrary to the Special Master's statements, Congress has never concluded that the Project will be unable to meet its debts. Public Law 96-550 (1980) authorized the Secretary of Interior to *defer* repayment until the Secretary determined that further repayment was feasible, at which time the District and the United States would renegotiate the existing repayment contract. Furthermore, the District has always met its operation and maintenance costs since 1955 and in fact has made several repayments to the Government for the capital costs of the Project (Tr. 1519-1520; 1525). No payments have been made since 1975 because of drastic water supply shortages. The representatives of the people have not written off the Vermejo Project — only the Special Master has.

Based upon his erroneous view of the history of the District and the failure of the Bureau of Reclamation Project to live up to expectations, the Special Master, astonishingly and with great illogic, concludes that therefore the water should be taken from the farmers in the District for an entirely new use outside the river system (Report at pp. 7, 23).

The impact of the Special Master's decision is no less severe in absolute economic terms with respect to the direct flow appropriators on the Vermejo in New Mexico. The Special Master's discussions of the Kaiser Steel rights most vividly illustrate his lack of comprehension of the potential impact by the award to Colorado upon direct flow appropriations in New Mexico. The Special Master's analysis of the Kaiser Steel right proceeds upon the assumption that flow measurements at the Dawson Gauge indicate that more than enough water is available to satisfy Kaiser Steel's rights, which include some of the senior rights of the Phelps Dodge Corporation, and that in any event Kaiser Steel has never diverted its full decreed appropriation (Report at p. 5). Assuming *arguendo* the validity of the Special Master's premises, his analysis looks at only one side of the water supply coin and fails to take into account (1) that industrial water is necessarily acquired years in advance in order to develop coal reserves with reasonably limited risk, (2) that a constant, dependable daily supply of water is imperative for operations [not an averaged yearly statistic], and (3) that the impact of *new depletions* in Colorado will on substantial occasions deprive Kaiser Steel of water at its authorized points of diversion. Kaiser Steel cannot operate with an undependable water supply. New Mexico's evidence, particularly Exhibit F-21 (Rev.), demonstrated that if Colorado depleted the Vermejo River in Colorado by 300 acre-feet a month (or 5 cfs a day) during the historically low flow months of April, June and September, there would be shortages to Kaiser Steel as well as Vermejo Park Corporation and other users below the Dawson Gauge. More dramatically, New Mexico Exhibit No. F-30 illustrates that if in May of the year 1977 Colorado had been entitled to take 67% of the flow of the water of the Vermejo River at the state line the flow in the

River at Dawson Gauge would have been *zero*. Similar results would have been expected for September and October of 1977 assuming Colorado depletions of 85% and 56% respectively of the flow at the state line. In all of these months there would have been severe shortage to Kaiser Steel's industrial demands (Tr. 1260-1262). And the testimony of the experts aside, the testimony of the lay witnesses who have lived day in and day out with the flows of the river was that there are chronic, substantial shortages, confirming the jeopardy to the area's economy from any award of base flow to Colorado. What is essentially illustrated by this evidence is that there are no excess flows in the Vermejo River which Colorado should be allowed to divert at or above the state line.[1]

The rights of two other direct flow appropriators on the Vermejo, the Phelps Dodge Corporation and the Vermejo Park Corporation, are given equally short shrift. The Report points out that only a small part of the decreed acreage owned by each company is actually irrigated at this time (Report at pp. 5-7). The Special Master believes that the Phelps Dodge and Vermejo Park Corporation water rights are measured only by their current use, not by their decreed amounts and uses in periods of adequate, dependable and predictable flow — a gross error. No recognition is given by the Special Master as to the reasons for the declining amount of irrigation on either the Vermejo Park or Phelps Dodge properties, i.e. chronic shortages of water — a second gross error — much less to the impacts

[1] Any doubt on this score is removed by the fact that Kaiser Steel itself was required in 1965 to purchase and retire rights on the Vermejo River in order to secure a water right for its York Canyon Mine. *W. S. Ranch Company v. Kaiser Steel Corporation*, 79 N.M. 65, 439 P.2d 714 (1968).

of new depletions in Colorado on the prospects of the two appropriators to increase their respective uses as water is dependably available — a third gross error. Apart from all that, the Special Master obviously believes, based upon Colorado's "averaging" of the flows in the river, that the flow is constant and uniform throughout the year — a fourth gross error, and the least understandable, because the common experience of all snow-melt-dependent streams is to the contrary.[2]

Other New Mexico users, the direct flow appropriators from the Vermejo canal, are not even mentioned in the Special Master's Report.

As indicated above, one principal difficulty with the Special Master's assessment of the impact of his decision on the Vermejo River users is his failure to distinguish between average flows and divertable flows at the Dawson Gauge in New Mexico. Colorado employed average flows, swollen by contribution from flood flows, to arrive at its estimate of water available to New Mexico users at the Dawson Gauge. New Mexico's evidence, on the other hand, discounted flood flows (unusable by the direct flow appropriators on the Vermejo) and thereby arrived at more dependable numbers expressed as the historic amount of water actually available to each New Mexico appropriator over

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[2] The inconsistency inherent in the Special Master's report is demonstrated by a comparison of two mutually contradictory sentences. On the one hand he states: "If the rule of priority were to be strictly applied . . . a diversion of water by Colorado would not occur." (Report at p. 21). On the other hand, "It is the opinion of the Master that a transmountain diversion would not materially affect the appropriations granted by New Mexico for users downstream." (Report at p. 23). If this last statement were true, a junior Colorado appropriator, diverting in priority, could certainly expect to receive water in usable quantities.

the period of record. The fact that the Special Master does not perceive the difference in statistical approach by the two states (Report at p. 2) further demonstrates his total miscomprehension of the record in this case. This Court has consistently stated that the use of average flows is not a realistic method for predicting the amount of water actually available to each state for uses in those states (e.g. *Nebraska v. Wyoming*, 325 U.S. 589, at p. 620 [1945]).

B. The Special Master Misunderstood the Doctrine of Equitable Apportionment. The Consequence of the Error Is a Recommendation Which Is Unsupported by Precedent and Is Grossly Inequitable.

The Special Master held a fundamental misunderstanding of the doctrine of equitable apportionment. He viewed the doctrine as absolutely entitling each state to a share of any stream flowing between them.[3] With this misconception, the Special Master proceeded to a consideration of the evidence in the belief that he had to apportion some water to Colorado, for new appropriations, from a stream which is unable to satisfy existing appropriations in New Mexico.

The Court has never announced such a rule. The upper state does not have a sovereign right to divert and use water regardless of injury to lower state users.[4]

The seminal fact in this case, significant in terms of this Court's precedents but obscured by the Special Master's discussion of what he perceives to be the "guiding

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[3] Report at p. 8.

[4] *Kansas v. Colorado*, 206 U.S. 46 (1907); *Wyoming v. Colorado*, 259 U.S. 419 (1922).

principle of equitable apportionment," is that both Colorado and New Mexico are prior appropriation states.

It is unfortunate that the Special Master started out on the wrong foot, for the misstep caused him to misunderstand *Nebraska v. Wyoming*, 325 U.S. 589 (1945). In an earlier apportionment case involving two states, each of which followed the prior appropriation doctrine, this Court had applied priority as a just and equitable method to resolve the controversy.[5] *Nebraska v. Wyoming* also involved states observing the prior appropriation doctrine. There, even though there were (unlike our case) existing uses to be protected in both states, this Court affirmed the proposition that "(p)riority of appropriation is the guiding principle," although all the factors which create equities one way or the other should also be considered in resolving an apportionment controversy.

The Special Master misperceived the "guiding principle" pronouncement. For example, the Special Master stated that *Hinderlider v. La Plata Co.*, 304 U.S. 92 (1938), "reaffirms the Court's position that the doctrine of *equitable apportionment* is still the *guiding principle* . . ."[6] (Report at p. 18, *emphasis added*) "Equitable apportionment remains the guiding doctrine . . ." (Report at p. 22). The Special Master thought that if he applied the priority doctrine followed by both Colorado and New Mexico, one of the factors to be used in making an equitable apportionment (established priorities) would "destroy the guiding principle itself." (Report at p. 17). Believing the guid-

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[5] *Wyoming v. Colorado*, 259 U.S. 419 (1922).

[6] As a matter of interest, *Hinderlider* was not even an apportionment case, but was a compact case.

ing principle to be equitable apportionment, not priority of appropriation, caused the Special Master to shunt aside priority from any consideration in this case.

The Special Master compounded his error by his notion that this Court has held that "factors other than priority must be applied to achieve equity" in cases involving interstate streams (Report at p. 21). The Court has not so held, but has held that all factors which *create* equities must be *weighed*, not "applied to achieve equity."[7]

What has happened, then, is the Special Master has considered the evidence, and has made his recommendation to the Court, pursuant to an understanding as to the applicable law which is contrary to this Court's pronouncements over many years. By proceeding into this case with the belief that he was required to award water to Colorado, that he was required to apply equitable apportionment as the guiding principle, and that he was required to apply factors other than priority to obtain an equitable apportionment, the Special Master has completely ignored the one factor (priority) which *Wyoming v. Colorado* stated was "eminently just and equitable" and which *Nebraska v. Wyoming* stated was the "guiding principle" in seeking a just and equitable resolution of the controversy.

Both Colorado and New Mexico observe the doctrine of prior appropriation. In suits between appropriation states, the Court has held that application of priority would be the equitable apportionment:

> We conclude that Colorado's objections to the doctrine of appropriation as a basis of decision are not well taken, and that it furnishes the only

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[7] *Colorado v. Kansas*, 320 U.S. 383 (1943).

> basis which is consonant with the principles of right and equity applicable to such a controversy as this is. The cardinal rule of the doctrine is that priority of appropriation gives superiority of right. Each of these states applies and enforces this rule in her own territory, and it is the one to which intending appropriators naturally would turn for guidance. The principle on which it proceeds is not less applicable to interstate streams and controversies than to others. Both states pronounce the rule just and reasonable as applied to the natural conditions in that region; and to prevent any departure from it, the people of both incorporated it into their constitutions. It originated in the customs and usages of the people before either state came into existence, and the courts of both hold that their constitutional provisions are to be taken as recognizing the prior usage rather than as creating a new rule. These considerations persuade us that its application to such a controversy as is here presented cannot be other than eminently just and equitable to all concerned. *Wyoming v. Colorado*, 259 U.S. 419, 470 (1922).

Wyoming v. Colorado therefore stands for the proposition that water rights developed on an interstate stream under the law of prior appropriation normally should be protected by the doctrine being applied interstate. The proposition is not inflexible if its application will result in an unjust and inequitable resolution of the controversy. Application of the doctrine was varied in *Nebraska v. Wyoming* and *Arizona v. California*, 373 U.S. 546 (1963), in order to protect established economies which were based on junior priority uses. As the Court stated in *Nebraska v. Wyoming*:

> So far as possible those established uses should be protected though strict application of the priority rule might jeopardize them. Apportionment

> calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former — these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made. *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945).

The law as to water rights disputes among private litigators on interstate streams between appropriation doctrine states is clear: the water rights first in time have a priority of use (as of their date of inception) over later appropriators; and the accidental intervention of a state line between the users is not significant. Although *Wyoming v. Colorado*[8] is essentially an equitable apportionment case, it also states succinctly the reasons and principles of this interstate priority doctrine, a doctrine that can be almost prophetically applied to the present case.[9]

> In suits between appropriators from the same stream, but in different states recognizing the doctrine of appropriation, the question whether rights

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[8] Where Colorado, being the upper-river state, made astonishingly similar arguments as in the instant case.

[9] New Mexico's appropriation doctrine water law is similar to, and adopted in large part from, Wyoming and Colorado's early laws. Hence, New Mexico can be substituted for Wyoming in the reading.

> under such appropriations should be judged by the rule of priority has been considered by several courts, state and Federal, and has been uniformly answered in the affirmative .... 259 U.S. at 470.

By express reference, the law applicable to interstate water rights disputes between private litigants was affirmed and held to be the same as in so-called equitable apportionment. *Wyoming v. Colorado*, 259 U.S. at 470, 471. That is the same law or principle of law followed in *Kaiser Steel Corporation, et al., v. CF&I Steel Corporation*, Civil No. 76-244-P (D.N.M. 1978), and as is universally applied in such interstate stream disputes. *Conant v. Deep Creek and C. Valley Irrig. Co.*, 23 Utah 627, 66 Pac. 188 (1901); *Willey v. Decker*, 11 Wyo. 496, 73 Pac. 210 (Wyo. 1903); *Taylor v. Hulett*, 15 Idaho 265, 97 Pac. 37 (1908); *Howell v. Johnson*, 89 Fed. 556 (10th Cir. Mont. 1898); *Hoge v. Eaton*, 135 Fed. 411 (D. Colo. 1905); *Morris v. Bean*, 146 Fed. 423 (D. Mont. 1906); *Bean v. Morris*, 159 Fed. 651 (9th Cir. Mont. 1908); *Lindsey v. McClure*, 136 F.2d 65 (10th Cir. N.M. 1943); *Albion-Idaho Land Company v. NAF Irrigation Co.*, 97 F.2d 439 (10th Cir. 1938); *U.S. v. Walker River Irrigation District*, 11 F. Supp. 158 (D. Nev. 1935); *Finney County Water Users' Association v. Graham Ditch Company*, 1 F.2d 650 (D. Colo. 1924).

And this Court has also expressly approved that principle. *Bean v. Morris*, 221 U.S. 485 (1911); *Weiland v. Pioneer Irrigation Co.*, 259 U.S. 498 (1922); *Rickey Land & Cattle Co. v. Miller & Lux*, 218 U.S. 258 (1910); *Arizona v. California*, 373 U.S. 546 (1963).

Thus, from these cases it is clear that, as to water disputes between appropriation doctrine states, priority of use is priority of right, and there is nothing in the law of equitable apportionment which is contrary.

From the foregoing, the critical concept is simply stated: In private litigation among appropriators from interstate streams between two prior appropriation doctrine states, the junior appropriators must give way until the senior appropriators' rights are filled; in original proceedings with respect to interstate streams between two prior appropriation doctrine states in one of which there has never been a use of the water, the rule of priority shall be the basis of the equitable apportionment. It follows that the result here should be exactly the same as in the private litigation in the federal court below — any Colorado users should be entitled to take water, but only in accordance with their priorities of appropriation from the river.

The foregoing principle is completely dispositive of this action. But assuming *arguendo* that the Court should, contrary to decades of established law, look to factors other than priority even where no use has ever been made of the water in one state, there are in this case no equities in favor of Colorado warranting destruction of the dependent New Mexico economies. The briefest allusion to the other factors catalogued in *Nebraska v. Wyoming* so demonstrates:

• (*"physical and climatic conditions"*) The Colorado portion of the Vermejo headwaters drainage consists of about 30 square miles, is above 8,500 feet, and is essentially uninhabited and inaccessible. These physical conditions precluded use of water in the Colorado portion and caused early appropriators to divert and use the Vermejo waters farther downstream in a region which at the time had not been admitted to the Union as a State.

• (*"consumptive use . . . and . . . return flows"*) Consumptive use and return flows do not occur in the Colorado portion because of the absence of any diversion for irriga-

tion (or other) use. Return flows do occur in New Mexico and are relied upon by downstream appropriators.

• (*"extent of established uses"*) Even today, the extent of established uses is zero in Colorado, but for nearly 100 years 100% of the river flow has been consumed in New Mexico.

• (*"availability of storage water"*) There are no storage water facilities in Colorado. Only the Vermejo Conservancy District in New Mexico has storage facilities.

• (*"effect of wasteful uses on downstream areas"*) There are no wasteful uses in Colorado affecting downstream areas because there are no Colorado uses.

•(*"damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former"*) No damage to the upstream Colorado area would occur by imposing a limitation of its use, because there is no use. The employment which the Special Master noted is supplied by CF&I Steel Corporation does not and never has depended upon Vermejo River water, because there has never been a use of that water by CF&I or any other Colorado user.

The Special Master recognized that Colorado has never diverted and benefically used any water, but that New Mexico has done so "and has existing economies which are dependent upon that water." (Report at p. 21).

A consideration of the *Nebraska v. Wyoming* factors thus does not disclose the existence of any equity in favor of Colorado which must be weighed. But since that list of factors is not exhaustive, what other factors were considered by the Special Master to create equities in favor of Colorado?

Three factors are mentioned: (1) CF&I Steel Corporation is a major employer in southern Colorado and northern New Mexico;[10] (2) CF&I's proposed use would have economic repercussions throughout the economy of the area;[11] and (3) the water in question originates in Colorado.[12] We have no quarrel with the proposition inherent in factors (1) and (2) that the proposed future appropriation may or can be beneficial. But these factors create no equity in Colorado requiring damage to downstream users.[13] The third factor does not create equity. It is simply the physical condition inherent in all interstate controversies involving interstate streams.

Thus, even these various additional factors do not create any equity in favor of Colorado to support the apportionment of any water to Colorado.[14]

Although he did not mention it specifically, it may be assumed that the Special Master accepted Colorado's evidence of severe shortages of water in the Purgatoire River,

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[10] Report at p. 17. As noted above, the employment has never depended upon any use of Vermejo River water.

[11] Report at p. 17.

[12] Report at p. 23.

[13] "It would be unreasonable in the extreme to reserve water for future use in New Mexico when senior downstream appropriators in Arizona remain unsatisfied. It was so held as to Colorado's claim in *Nebraska v. Wyoming*, 325 U.S. 589 (1945)." Special Master Report, *Arizona v. California*, Dec. 5, 1960, p. 331.

[14] In the Report at pages 22-23 the Special Master curiously concluded that Colorado "in a sense" has a junior appropriation in the form of an inchoate water right. On this predicate, Colorado could be apportioned water since "senior water rights may be subrogated to junior water rights so that equity may prevail." The trouble with this analysis is that Colorado has never used the water to establish any economy for which out-of-priority protection should be afforded.

of its over appropriated condition, and of "the inability to satisfy anything but the most senior rights" (Colorado's post hearing brief, p. 8). These detrimental conditions are matched by shortages on the similarly over appropriated Vermejo; and the detriment shared by both states does not raise an "equity" in Colorado's favor. The true significance of the shortages is to emphasize the *inequity* of Colorado's attempt to characterize as "historic usage" the meager supplies divertable from the River during this period of shortage. In neither state is a junior appropriator deprived of his right merely because all available water is consumed by those with senior rights. Yet the definition of "historical usage" without reference to the rights adjudicated and to the availability of water to satisfy them is devoid of any semblance of equity and fairness.

Colorado's claim of an "equitable share" of water rests, in the last analysis, upon its territorial sovereignty or "lordship" over 30 square miles of mountain real estate which are remote and virtually untouched. Its "equity" lies in its ownership — an accident of geography directly resulting from the relocation of territorial boundaries. For the Vermejo is historically New Mexican. All of it was subject to the sovereignty of Spain and Mexico; and it was part of the Territory of New Mexico until 1861, when Colorado was carved out as a territory from portions of the Territories of Utah, New Mexico, Kansas and Nebraska.

The relocation of the territorial boundary at the 37th rather than the 38th parallel made good sense geographically in 1861, as the summit of Raton Pass separated the drainage of the Purgatoire, flowing Northeast to the Arkansas River, from that of the Canadian River to the South. But a line of latitude superimposed on the topographical features of the landscape is inherently arbitrary.

And this obscure pocket of Vermejo drainage has been overlooked or ignored for a full century. New Mexico has adjudicated the Vermejo as a New Mexico river without consciousness of intruding into Colorado's domain; and Colorado has similarly defined the statutory jurisdiction of its water courts without any awareness of its Canadian River drainage.[15]

Without question, this obscure domain belongs to Colorado and is subject to its sovereignty. But as an equitable factor to justify the suppression of legitimately established New Mexico uses, this naked sovereignty is a weak reed, long since rejected as a basis of apportionment.[16]

IV. CONCLUSION

Regrettably, the Special Master misunderstood the physical evidence in this case, even misunderstanding that appropriators must rely on the base flow (dependable flow) of a stream. The Special Master also misunderstood the doctrine of equitable apportionment, which, on the facts of this case, is precisely the same as the common-law doctrine of prior appropriation with respect to private litigation on interstate streams. And even were the Court, contrary to long established precedent, to look to other "equities," there are no equities for Colorado warranting destruction of the long established, wholly dependent New Mexico economies. To adopt the Special Master's recom-

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[15] §37-92-201(1)(b) CRS, 1973, defines the jurisdiction of the Water Court, Division 2, as follows: "Division 2 consists of all lands in the state of Colorado in the drainage basins of the Arkansas River and the Dry Cimarron River, and streams tributary to said rivers." The Vermejo is tributary to the Arkansas only in the sense that the Canadian joins the Arkansas at a point southeast of Tulsa, Oklahoma.

[16] *Kansas v. Colorado*, 206 U.S. 46 (1907).

mendations would be a total departure from this Court's established precedents and would cause a grossly inequitable result.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Burton M. Apker, hereby certify, pursuant to Rules 33.3 and 33.5 of the Rules of the Supreme Court of the United States, that I am a member of the bar of this Court and am counsel of record for the Amici Curiae named in the foregoing Motion for Leave to File Brief As Amici Curiae and Brief Amici Curiae of Kaiser Steel Corporation, Phelps Dodge Corporation, Vermejo Park Corporation and Vermejo Conservancy District in Support of the Position of the State of New Mexico, and that on the 6th day of April, 1982, I caused to be served the requisite number of copies of the foregoing Motion and Brief, by first class mail, with postage prepaid, addressed to counsel of record for the States of Colorado and New Mexico, respectively, as follows:

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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 80, Original

THE STATE OF COLORADO,
Plaintiff

v.

THE STATE OF NEW MEXICO,
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE
OF NEW MEXICO,
Defendants.

RESPONSE TO MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

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Comes now the state of Colorado, through its attorney general, and responds to the motion for leave to file a brief as *amici curiae* filed by Kaiser Steel Corporation, Phelps Dodge Corporation, Vermejo Park Corporation, and the Vermejo Conservancy District.

The state of Colorado opposes the motion for leave to file a brief as *amici curiae*. As grounds therefor, the state of Colorado states:

1. The four entities which have sought leave to file a brief as *amici curiae* are represented by the state of New Mexico in this case under the principle of *parens patriae*. *New Jersey v. New York*, 345 U.S. 369 (1953); *see Environmental Defense Fund, Inc. v. Higginson*, 631 F.2d 738 (D.C. Cir. 1979).

2. The motion for leave to file a brief as *amici curiae* does not "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties," as required by Rule 36.3 of the Revised Rules of this Court. Under the *parens patriae* principle, the state of New Mexico is presumed to represent adequately all of its citizens. *New Jersey v. New York, supra*. The four entities have not suggested that their representation by New Mexico is inadequate in any way.

3. The proposed brief of the *amici curiae* is repetitious. The brief of New Mexico in support of its exceptions to the report of the special master in this case, dated April 7, 1982, presents the same facts and legal arguments.

4. The state of Colorado has limited time to respond to the exceptions filed by New Mexico to the report of the special master and should not also be burdened with responding to the proposed brief submitted by the four New Mexico entities.

5. As further evidence that the four entities which seek leave to participate as *amici curiae* are adequately represented by New Mexico, the state of Colorado notes that Mr. Neil C. Stillinger, Esq., who is listed as "of counsel" on the proposed brief of the *amici curiae*, was appointed as a special assistant attorney general for the state of New Mexico for this case and participated at the hearings before the special master. *See* Appendix A.

Respectfully submitted,

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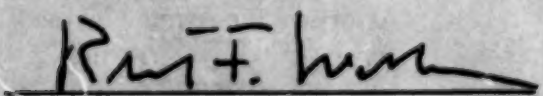

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CERTIFICATE OF SERVICE

I, Robert F. Welborn, hereby certify that I am counsel of record for the plaintiff and that on April 23, 1982, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be mailed the requisite number of copies of the foregoing Response to Motion for Leave to File Brief as *Amici Curiae*, by first class mail, postage prepaid, to the following:

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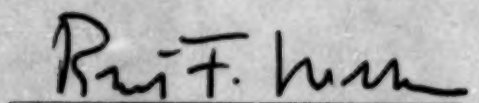

APPENDIX A

PROCEEDINGS

THE COURT: The State of Colorado, Plaintiff, versus the State of New Mexico and others, Defendants. Is the Plaintiff ready?

MR. HAMBURG: We are ready, Your Honor.

THE COURT: Are the Defendants ready.

MR. SIMMS: Yes, sir.

THE COURT: Very well.

This is a hearing before the Special Master pursuant to an order of the Supreme Court. I think it would be well for the benefit of the reporter for the State of Colorado to announce its appearance, Mr. Hamburg.

MR. HAMBURG: My name is Donald H. Hamburg, Special Assistant Attorney General, with me is Robert Welborn, Special Assistant Attorney General, also at counsel table is Phillip Barber, Attorney for CF&I Corporation, and Mr. Duane Helton, he's our principal engineering expert witness, and also Mr. Dan Merriman who is also an engineering expert witness.

SPECIAL MASTER: Very well. New Mexico.

MR. SIMMS: I'm Richard Simms,

Special Assistant Attorney General, and Special Counsel to the New Mexico Interstate Stream Commission. Appearing with me Mr. Jay Stein, Special Assistant Attorney General, and a recently commissioned Special Assistant Attorney General, Mr. Neil Stillinger, also counsel for the Vermejo Conservancy District.

I would also like to introduce to Your Honor certain counsel in the audience. Mr. Paul Kastler, representing Kaiser Steel Corporation, Mr. Paul Eaton representing the Penzoil Corporation, and in particular, the Vermejo Park Corporation, and Burton Abker, and Gordon Absker representing Phelps Dodge.

With me is Phil Mutz, the chief engineer of the New Mexico Interstate Stream Commission.

SPECIAL MASTER: Very well. Do counsel wish to make an opening statement?

MR. HAMBURG: Yes, Your Honor.

SPECIAL MASTER: You are at liberty to do so.

MR. HAMBURG: May it please the Special Master. In order to obtain its fair share of the waters of the Vermejo River, the State of Colorado has brought this action for equitable

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June 21, 1982

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THE STATE OF COLORADO'S REPLY TO BRIEF OF AMICI CURIAE

June 21, 1982

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The State of Colorado respectfully submits the following reply to the Brief Amici Curiae of Kaiser Steel Corporation, Phelps-Dodge Corporation, Vermejo Park Corporation and Vermejo Conservancy District in Support of the Position of the State of New Mexico (hereinafter sometimes referred to as "Amici Brief").

I. AMICI HAVE MISUNDERSTOOD THE LAW OF EQUITABLE APPORTIONMENT

Going to the core of the argument presented by the Amici Brief, Colorado perceives three basic allegations of the Amici with respect to the Report of the Special Master:

1. The Special Master erred in examining actual water usage in New Mexico rather than relying upon decreed rights listed in the 1941 Vermejo River Decree, the 1949 "Vermejo Project Report" and the 1952 "Definite Plan Report" for the Vermejo Conservancy District.

2. The Special Master erred in concluding that an award of 4,000 acre feet of water per year to Colorado from the Vermejo River system, with the remainder to New Mexico, would be equitable.

3. The Special Master's failure to allocate water on the basis of priority dates constituted a misapplication of the law of equitable apportionment.

All three allegations attempt to reinforce the basic premise of Amici's (and the State of New Mexico's) theory of this case: the priority dates of the water claimants should be the only factor determining the allocation of water. However, this Court has not subscribed to such a position, and instead has adopted the doctrine of equitable apportionment to resolve interstate water disputes. *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Wyoming v. Colorado*, 259 U.S. 419 (1922); *Kansas v. Colorado*, 206 U.S. 46 (1907).

Amici urge that as between Colorado and New Mexico this Court should strictly apply the prior appropriation doctrine. They contend that ". . . the rule of equitable apportionment is the rule of prior appropriation . . ." (Amici Brief, p. 8). However, in equitable apportionment suits this Court does not rely solely on the prior appropriation or riparian doctrine, or on the water laws of a particular state. Rather, it has considered each case individually, with due regard to the multitude of factors which contribute to a fair allocation of water from an interstate system. *Nebraska v. Wyoming*, 325 U.S. at 618. As this Court stated in *Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931):

> For the decision of the suits between States, federal, state and international law are considered by this Court as the exigencies of the particular case may require. The determination of the relative rights of contending States in respect of the use of streams flowing through them does not depend upon the same considerations and is not governed by the same rules of law that are applied in such States for the solution of similar questions of private right. *Kansas v. Colorado*, 185 U.S. 125, 146. As was shown in *Colorado v. Kansas*, 206 U.S. 46, 100, such disputes are to be settled on the basis of equality of right. But this is not to say that there must be an equal division of the waters of an interstate stream among the states through which it flows. It means that the principles of right and equality shall be applied having regard to the "equal level or plane on which all the states stand, in point of power and right, under our constitutional system" and that, upon a consideration of the pertinent laws of the contending states and all other relevant facts, this Court will determine what is an equitable apportionment of the use of such waters. *Wyoming v. Colorado*, 259 U.S. 419, 465, 470.

Subsequently, in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), this Court stated:

> . . . [S]ince Colorado, Wyoming, and Nebraska are appropriation States, the principle would seem to be equally applicable here. . . . But if an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible. . . . Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former — these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interest which must be made.

For these reasons the Special Master did not misunderstand the doctrine of equitable apportionment when he concluded that:

> The equities of these cases require that the Master consider many factors, not just the law of the States involved. Thus, although appropriation is an important factor to be considered, the Master must also consider other factors such as whether or not there is "real or substantial injury or damage."

Report at p. 14.

The Special Master correctly understood that this case could not be resolved solely on the basis of prior appropriations and that his primary task was an examination of all of the equities of the case.

When this case began, the State of New Mexico argued that Colorado could not be awarded any water because any allocation to Colorado would be contrary to the doctrine of prior appropriation and would not protect the "existing economies" in New Mexico. Apparently as a result of the Special Master's finding that "existing economies" in New Mexico would not be affected by a diversion of 4,000 acre feet of water per year in Colorado (Report, p. 23), Amici (and New Mexico) now have narrowed their argument to state that the law of prior appropriation is the law of equitable apportionment. Amici refer to a federal common law doctrine of priority of appropriation (Amici Brief, p. 7). The only federal common law of water allocation between states is that of equitable apportionment. *Kansas v. Colorado.* Priority of appropriation is solely a state law concept. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

To buttress their position Amici cite numerous cases involving water disputes between private litigants (Amici Brief, p. 20), cases in which the prior appropriation doctrine was deemed applicable. Significantly, not one of the cases cited by Amici is an equitable apportionment action resolving the respective rights of states in an interstate stream.[1]

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[1]The federal district judge hearing *Kaiser Steel Corporation v. CF&I Steel Corporation*, No. 76-244 (D. N.M. 1978), expressly stated in a letter to counsel that the principles of equitable apportionment did not control the case, involving as it did only private litigants. See Reply Brief of the State of Colorado at 71.

With two exceptions, the parties to the cases cited by the Amici were private claimants residing in different states, who sought either to quiet title to their water rights or to enjoin competing diversions or changes in uses.[2] The predominant issue in all of these cases was not the priority of water rights or the equity of the water allocation, but the jurisdiction of courts and the authority of state officials to grant relief that would affect the rights of water users residing outside the boundaries of the state where the action was brought.

The doctrine of equitable apportionment, not prior appropriation is the law governing interstate water allocation, because equitable apportionment recognizes the real and substantial interests of both states in an interstate stream, which interests must be reconciled upon consideration of all relevant factors and equities. *New Jersey v. New York*, 283 U.S. 366 (1931); *Nebraska v. Wyoming*. By contrast, if Amici's position were accepted this Court would decide this case solely upon the priority dates of the various water claimants, without regard to any other facts. Allocating water of the Vermejo River based strictly upon priority dates without an examination of all of the equities would be highly unfair in this case, because the priority dates of the water claimants do not:

1. Take into account that New Mexico's users either do not need or do not efficiently use the full measure of their decreed rights;

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[2]The United States initiated the action to quiet title and restrain diversions in *United States v. Walker River Irrigation District*, 11 F. Supp. 158 (D. Nev. 1935). There, however, the court merely observed that the government's water rights in Nevada, just as those of any other user, were to be adjudicated and administered according to Nevada's law of appropriation. *Id.* at 167. Furthermore, the parties stipulated that appropriation principles should control the disposition of their claims. *Id.* at 168. And, *Arizona v. California*, 373 U.S. 546 (1963), as Colorado has repeatedly noted, concerned neither equitable apportionment nor prior appropriation; that case required an interpretation of the Boulder Canyon Project Act.

2. Consider the extent to which New Mexico's users engage in wasteful practices or how waste might be eliminated and the common supply conserved;

3. Show that administration of the Vermejo River in New Mexico encourages inefficiency and does not promote conservation;

4. Recognize that the unregulated and proliferating water detention dams, stock water ponds and fishponds along the Vermejo River seriously deplete the available supply;

5. Recognize that New Mexico seeks to reserve the waters of the Vermejo system for future development in New Mexico;

6. Take into account the dire need for water in Colorado or the fact that while Colorado contributes approximately one-half of the flow of the Vermejo River it is presently enjoined from making any use of its own water.

7. Reflect the differences in the substance and application of the prior appropriation doctrine in Colorado and New Mexico;

8. Consider that Colorado's diversion of 4,000 acre feet per year from the Vermejo River will not materially affect the existing economies in New Mexico.

Just as the above factors were properly before the Special Master in this equitable apportionment proceeding, a recent case from the Ninth Circuit shows that even under a strict application of the priority doctrine between private litigants, certain of the above factors must be taken into account. In *United States v. Truckee-Carson Irrigation Dist.*, 649 F.2d 1286 (9th Cir. 1981), the United States and the Pyramid Lake Pauite Tribe of

Indians brought an action to quiet title to water rights to sustain a lake fishery. The Truckee-Carson Irrigation District ("T.C.I.D.") asserted that its water rights decree was *res judicata* on the issue of water rights in the stream, contending that a water right for fishery purposes would deprive it of water which it had been previously decreed. The Court of Appeals disallowed the defense of priority of appropriation, noting the equitable considerations mitigating the potential effects of the decision:

> We realize that this judgment results in hardship to T.C.I.D. and its members. However, this is mitigated by several factors. First, T.C.I.D. obtains water from two rivers, the Carson and the Truckee. Even if the Tribe succeeds in establishing its entitlement to substantial additional Truckee River water, it is possible that much of the T.C.I.D.'s need could be satisfied by Carson River water. Second, the Newlands Project is relatively inefficient in its use of water. See *Pyramid Lake Tribe v. Morton, supra*, 354 F. Supp. at 257. Improvements in water storage and distribution could result in substantial efficiencies to ameliorate any hardship to T.C.I.D. . . .

649 F.2d at 1311.

The analysis of the Court of Appeals bears a striking similarity to certain equitable factors presented by Colorado. The Vermejo Conservancy District can substantially improve its water distribution system and derives at least thirty percent of its water supply from the Chico Rico River, which will not be affected by the case at bar (Tr. 1303, 1564). *See also Colorado v. Kansas*, 320 U.S. at 398-399.

Amici urge the most rigid application of the priority of appropriation doctrine. The system they propose

would not take into account the equitable factors listed above or the factors considered in the *T.C.I.D.* case.[3] Amici, like New Mexico, seek to avoid an examination of what is fair and equitable. Yet, this Court ordered that the Special Master hear Colorado's and New Mexico's evidence regarding the equitable apportionment of the Vermejo River. Having heard the facts, the Special Master saw the inherent unfairness of the present division of the Vermejo River under which New Mexico neither presently requires nor properly uses the entire flow of the River but nonetheless has enjoined any diversions in Colorado. Had New Mexico or Amici proven a present beneficial use of the entire Vermejo, had they shown that any Colorado diversion would be "disastrous" to Amici, this might be a different case. What was proven at trial was quite different, however, and the Special Master awarded water to both states, recognizing that such an allocation would not materially affect uses in New Mexico and would not injure "existing economies" in New Mexico (Report, p. 23).

In short, Amici argue that even though New Mexico appropriators will not be materially affected, even though Colorado sorely needs a portion of the water which it contributes to the Vermejo River system, and even though New Mexico will continue to receive the lion's share of the annual production of the Vermejo River, the Report of the Special Master is unfair. A review of the record speaks to the contrary.

---

[3]Even under a proper administration of the priority system, Colorado should be allocated water because under such administration as is the case in Colorado, certain New Mexico rights or portions thereof would likely be declared abandoned, surveillance of the amount of water diverted in relation to land irrigated would occur and there would be a concern for waste and beneficial use. (Tr. 521, 523-29, 563-65, 593). C.R.S. 1973, §37-92-502.

II. ACTUAL NEED AND BENEFICIAL USE, RATHER THAN DECREED RIGHTS, SHOULD BE THE BENCHMARK FOR AN EQUITABLE APPORTIONMENT OF THE VERMEJO RIVER.

Amici's assertion that decreed, paper rights contained in the 1941 Vermejo River Decree (Colo. Ex. 25) and projections regarding the Vermejo Conservancy District found in the "Definite Plan Report" should control (Colo. Exs. 17, 18 and 19), and Amici's contention that the Special Master's allocation of Vermejo River water is inequitable, derive from the posture that the State of New Mexico and Amici have taken throughout this case.[4] That is, Amici resent an inquiry into the extent and nature of New Mexico's actual usage of Vermejo River water. Amici in their Brief, like New Mexico in its Brief in Support of Exceptions, seek to limit the scope of this Court's inquiry to documents which do not reflect the realities and extent of New Mexico's uses. However, this Court ordered the Special Master to receive evidence and make his recommendations for an equitable apportionment. Amici wistfully here argue that the evidence and the Master's Report should be ignored.

The Special Master engaged in "[a] thorough examination of the existing economies in New Mexico . . ." (Report, p. 23). The evidence in the record proved the following facts regarding those economies and their uses of Vermejo River water:

(a) That the first diverter in New Mexico, the Vermejo Park Corporation, has not irrigated the full amount of acreage which it may irrigate, even though an average of 8,400 acre feet per year of water

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[4]The attorneys for Amici Curiae were present at the trial, and the attorney for one of them, the Vermejo Conservancy District, was a Special Assistant Attorney General for New Mexico during the trial and briefing before the Special Master (Tr. 3, 4).

passes its headgate (Colo. Ex. 5) and even though New Mexico's State Engineer admitted that Vermejo Park could have irrigated more acreage (Tr. 2427);

(b) That although water is available, Kaiser Steel Corporation does not have a present need for or use of the full amount of its decreed rights, and that its use has actually decreased since 1976 (Tr. 1725-1727; Colo. Ex. 6, Tbls. 1 and 2);

(c) That Phelps-Dodge Corporation cannot use all of the water available to it under the first priority on the River, and has leased a portion of its water rights to Kaiser to avoid having a portion of its rights declared forfeited or abandoned (Colo. Ex. 51; Brief in Support of Exceptions of the State of New Mexico, p. 27; Colo. Ex. 6, pp. 6-7);

(d) That undecreed uses for water detention, stockwater and fishpond structures seriously deplete the supply of the River (Colo. Exs. 37, 38, 40, 43, 44, 45 and 48);

(e) That the Vermejo Conservancy District is extremely inefficient in its use, and is made up of parttime farmers who could avoid any adverse effects of a diversion in Colorado by installing a closed stock watering system for which funds are available (N.M. Ex. E-3; Colo. Exs. 69, 70); and

(f) That New Mexico's administration of the Vermejo River is so inefficient that there is no surveillance of the amount of water diverted in relation to the land irrigated (Tr. 1071, 1072, 1099, 1111-1115) and that Phelps-Dodge can divert in one month the amount of water to which it is entitled in an entire year (N.M. Ex. A-130).

What these facts show, and what Amici would have this Court ignore by urging total reliance upon decreed

rights rather than upon actual conditions, is that decreed rights bear little relation to the realities of actual appropriation. Based in part upon the facts outlined above the Special Master was able to conclude that there would be no material affect on New Mexico users downstream and that the benefit of a Colorado diversion would outweigh any detriment to New Mexico.

What Amici and New Mexico argue for is a preservation of a *status quo* on an interstate stream by denial of a right to divert water to a state which contributes approximately one-half of the water to that stream. That result would be inequitable in the extreme, would encourage wasteful use and reserve water for hypothetical and future uses in New Mexico at the expense of present, actual need in the State of Colorado.

III. AMICI'S SPECIFIC OBJECTIONS ARE NOT WELL-TAKEN AND DO NOT AFFECT THE VALIDITY OF THE SPECIAL MASTER'S REPORT.

The first eight pages of Amici's Brief purport to discuss the irrigation and industrial rights of the various New Mexico users. In this entire discussion, there is not one reference to the evidence presented at trial. The reason for such an omission is that Amici's discussion of the rights of the New Mexico users does not take into account the actual usage on the Vermejo, but rather looks only to the various decrees.

Beginning at page 8, Amici argue that the Special Master's Report uses an incorrect basis for determining the amount of available water in the Vermejo River system. Ironically, Amici criticize Colorado for employing "average flows" in its hydrologic data (Amici Brief, p. 14), but cite as evidence of the District's alleged shortage two New Mexico Exhibits, F-22 and F-37, which employ annual averages. Neither New Mexico Exhibit F-22 nor New Mexico Exhibit F-37 accurately

reflects the amount of water available to the District. Both exhibits merely reflect the amount of water applied by the District to its fields, and do not show the amount of water which was available at and diverted through the District headgate. In other words, New Mexico Exhibits F-22 and F-37 reflect only about one-third of the water which was actually available to the District, the remaining two-thirds of the water being lost en route to the fields (Colo. Exs. 69, 70).

The answer to Amici's criticism of the Special Master's use of average flows is twofold. First, yearly and monthly averages were accepted by *both* Colorado and New Mexico as the most accurate way of representing the actual flow of the Vermejo River. Both Colorado and New Mexico used yearly averages in many of their tables (Colo. Exs. 5, 6, 69, 70; N.M. Exs. F-4 through F-20, F-29, F-37). Colorado also used monthly averages to show the available supply in the Vermejo River system (Colo. Ex. 5, Tbl. 2). While other methods for computing the available and dependable supply of a river may exist, the Special Master had excellent dependable supply evidence before him, which was utilized by both parties and which consisted of flows computed on a monthly and yearly basis.

Second, New Mexico's principal hydrologic witness, Mr. Mutz, admitted that the Vermejo Park Corporation, Kaiser and Phelps-Dodge would be minimally affected, if at all, by Colorado's diversion (Tr. 1323, 1379). Thus, the question of whether the use of average flow to determine available supply was appropriate is important only in light of the Vermejo Conservancy District. Because the Vermejo Conservancy District has an extensive reservoir system, the express purpose of which is to regulate and even out the low flow and high flow years (Tr. 1298), use of averages in determining available and dependable supply is most proper with regard to the District. Colorado Exhibit 17, the "Vermejo Project Report" for the Vermejo Conservancy District,

uses average flows as a gauge for determining the amount of water available for the District. With the District's ability to capture water and store it from month to month, or even year to year (N.M. Ex. F-37), use of monthly or yearly flows was a highly appropriate means of estimating the amount of water which the District could divert and store, hence its dependable supply.

Amici urge that a diversion of 4,000 acre feet annually by Colorado would be ". . . most of the dependable flow" of the Vermejo River. This contention is unsupportable. The Special Master concluded that Colorado's measurements of the Vermejo River flow, consisting of actual stream flow measurements, were more accurate than New Mexico's altitude-runoff estimate to show Colorado's contribution to the Vermejo system (Report, p. 4). He also determined that Colorado's measurements were probably low, because they did not include the production from one of the Colorado tributaries to the Vermejo River (Report, p. 3). These figures show that Colorado contributes over 8,400 acre feet of water per year to the Vermejo River (Report, p. 3; Tr. 2527, 2528; Colo. Ex. 5). During the same period of measurement, and after depletions by upstream users in New Mexico, over 11,000 acre feet of water flowed past the Dawson gauge (Colo. Ex. 5, p. 4). Thus, Colorado would take less than one-half of its contribution to the Vermejo River system, and only about one-fourth of the virgin flow and dependable supply in the Vermejo River. Amici therefore overstate the impact of Colorado's diversion.

Amici also appear to take the position that a "dependable supply" is equivalent to the lowest recorded flow of the Vermejo River over an extended period of time. Using the lowest recorded flow as a measure of dependable supply would be as inaccurate as using the highest recorded flows to prove availability. See *Wyoming v. Colorado*, 259 U.S. at 484.

At pages 10-13 of their Brief, Amici argue that the Special Master did nothing to protect the existing economies along the Vermejo River, but rather based his award upon some sort of economic evaluation of the viability of the Vermejo Conservancy District. The Special Master's conclusion that the Vermejo Conservancy District ". . . should have never been built . . ." merely reflects the conclusion advanced at trial by New Mexico's witness from the United States Bureau of Reclamation (Tr. 1586). Contrary to Amici's argument, the Special Master did not engage in an economic evaluation of the District or attempt to justify the "obliteration" of the District (Amici Brief at p. 9). The Special Master did just the opposite. He examined existing conditions in the District and along the Vermejo River, examined water availability to those users over a period of time and concluded that existing uses along the Vermejo River could be satisfied notwithstanding an award of 4,000 acre feet per year to Colorado. The Special Master states at page 23 of his Report:

> It is the opinion of the Master that a transmountain diversion would not materially affect the appropriations granted by New Mexico for downstream users. A thorough examination of the *existing economies* in New Mexico convinces the Master that the injury to New Mexico, if any, will be more than offset by the benefit to Colorado.

(emphasis added).

While the Special Master's Report may not recognize the full extent of paper rights along the Vermejo River, it does take into account actual impacts on "downstream users" and "existing economies" and concludes that they can be accommodated under an award of water to Colorado.

Amici contend that the Special Master also gave "short shrift" to the rights of the Phelps-Dodge Corporation, the Vermejo Park Corporation and Kaiser Steel Corporation (Amici Brief, p. 13). Their complaint is based upon the fact that the Master did not recognize the full decreed rights as the actual usage of those water claimants. While Amici complain that the Master did not recognize the full extent of the decreed rights, they do not provide a reasonable explanation of why at present, when there is no Colorado diversion, most of them have not used the full measure of their rights even when water has been available (Colo. Exs. 68, 69; Tr. 2174). The State of New Mexico, in its Brief in Support of Exceptions at page 27, and in a rare moment of candor, admits that Phelps-Dodge leased 400 acre feet of water per year to Kaiser Steel Corporation in order to avoid a forfeiture of that right. Obviously, Phelps-Dodge is not presently exercising the full extent of its water rights. Amici demand that they be awarded all of the water in the Vermejo River in part for future uses, and in part to avoid having to more reasonably use the water which they now divert.

The Amici Brief at pages 21, 22 and 23 purports to analyze *Nebraska v. Wyoming* in light of the several factors mentioned in that case as being relevant to equitable apportionment considerations. They would conclude that none of the specific factors mentioned are relevant to the case at bar, and that the allocation of Vermejo River water should be on the basis of priority dates. Without doubt, four of those factors are most pertinent equitable considerations in the case at bar:

1. The "extent of established uses" is relevant in relation to the claims of the Amici that they should be recognized as having established uses on the Vermejo requiring the full amount of their decreed rights. As discussed herein, Amici's "established uses" employ much less water than the full amount of Amici's decreed rights. Their *actual* usage is protected by the Special Master's Report.

2. The "availability of storage water" is also very relevant. Storage of water is at the heart of any conservancy district project, and is the means by which the Vermejo Conservancy District deals with the dependable supply matter which Amici emphasize. The District's ability to capture and store water from month to month and year to year means it is not primarily dependent upon the direct flow of the Vermejo for its immediate water supply. By diverting and storing water during high flow periods, the District can provide for its needs in months of low flow. Similarly, the ability to store water over an extended period gives the District an additional supply which it can use to offset any Colorado diversions. The District, unlike any other user in New Mexico, can capture the high runoff from snowmelt or from thunderstorms, store that water and use it during drier periods. Because the District can store water in a manner to prevent injury, it would be inequitable not to consider these storage facilities.

3. Another factor mentioned in *Nebraska v. Wyoming* is the ". . . effect of wasteful uses on downstream areas." The Amici say that this factor is not relevant because there are no uses in Colorado which affect downstream areas. However, it is clear that what this Court was considering was the impact of wasteful uses, not whether they take place in one state or another. Wasteful uses are very much involved in this case as indicated by the sixty-seven percent loss of water from the Vermejo Conservancy District headgate to the farms and by the great number of water detention dams, stockponds and fishponds which are a major factor on the Vermejo River. The District alone can conserve over 2,000 acre feet per year by installing a closed stockwatering system. Improvements to its canal and reservoir systems, and consolidation of unnecessary stockponds, fishponds and water detention dams would conserve an even greater amount of water without impairing decreed rights on the Vermejo.

4. Finally, a factor mentioned in *Nebraska v. Wyoming* is ". . . damage to upstream areas as compared to the benefits to downstream if a limitation is imposed on the former." Here again the main consideration is the matter of benefits and damage to particular areas resulting from the allocation of water from an interstate stream. The Special Master specifically engaged in such an analysis, finding ". . . that the injury to New Mexico, if any, will be more than offset by the benefit to Colorado." (Report, p. 23). As this Court held in *Nebraska v. Wyoming*, the Special Master concluded that the principle of priority of appropriation should not be strictly adhered to in the case at bar because of "[c]ountervailing equities in favor of Colorado."

Concluding its discussion of the case, the Amici Brief recognizes that the listing of factors in *Nebraska v. Wyoming* "is not exhaustive" and then purports to give the exclusive list of other factors. The extensive evidence presented in this case is filled with many factors which the Special Master no doubt considered in relation to the equities and which would be accepted under the philosophy of *Nebraska v. Wyoming*, which really teaches that *all* factors bearing on the equities are to be considered.

What the Special Master did was to look behind New Mexico's argument that decreed rights are the measure of usage in New Mexico. He evaluated actual usage and compared that usage with available water. What he concluded was that "downstream users" and "existing economies" could be satisfied and Colorado could be given its equitable share of the Vermejo River system. His recommendations are based upon an evaluation of the actual facts and support his conclusion ". . . that a transmountain diversion [in Colorado] would not materially affect the appropriations granted by New Mexico for users downstream." (Report, p. 23.)

IV. EVIDENCE IGNORED BY AMICI

In their Brief, Amici rely for their case on virtually one document dated and reflecting conditions in 1941. This document is a water adjudication decree for the Vermejo River (Colo. Ex. 25) which shows the rights and uses of various appropriators of water as of that date. Attempting to confine the consideration of equities along the Vermejo River solely to the paper rights claimed to derive from this one document, Amici deliberately ignore important evidence of developments since 1941 and the current conditions. What the Amici seek to achieve is obvious. They seek to place ahead of any claim by Colorado possible future uses in New Mexico based on the volumes set forth in the 1941 decree.

Basic evidence in the record which is ignored by Amici is the following:

1. New Mexico's Exhibit E-3, the Dennis Engineering Report, establishes that 2,000 acre feet of water could be saved annually by a closed stockwater system. Not one reference to this exhibit or to the testimony in regard thereto appears in the Amici Brief, nor is there any discussion of the significant water losses which occur through the present stockwater system.

When this document, E-3, is coupled with the testimoney of New Mexico's chief witness, Mr. Mutz, that the Colorado "diversion would be essentially felt in its entirety" by the District (Tr. 1323) and the testimony of the same witness as to the losses of water from seepage and evaporation which can be curtailed (Tr. 1280, 1285, 1286, 1297, 1315, 1318), it establishes beyond question that any injury to New Mexico by the Colorado diversion could be prevented by proper conservation measures.

The facts developed by New Mexico's Exhibit E-3 are that over 2,000 acre feet of water are lost through evaporation or seepage by the method of providing stockwater in the wintertime through open canals. In view of the fact that only approximately one-third of the water diverted from the Vermejo River by the District reaches the farms, a saving of 2,000 acre feet in the stockwater system would be equivalent to a much larger amount of water taken from the River (Colo. Reply Brief, p. 52; Colo. Ex. 70; N.M. Exs. D-2, F-21 Revised, F-29, F-37).[5]

2. Ignoring the evidence to the effect that the injury to the Vermejo Conservancy District could be prevented, the Amici avoid dealing with the evidence showing that the uses of Phelps-Dodge Corporation, Kaiser Steel Corporation and Vermejo Park Corporation would not be significantly affected by the diversions by Colorado of 4,000 acre feet allocated by the Special Master. We will discuss this evidence in relation to each one of these corporations.

A. Phelps-Dodge Corporation

The fact that Phelps-Dodge is now irrigating no more than 150 acres, and probably less than that, is due not to any shortage of water available for its first priority on the River but rather to its own choice. Under the water allocations on the Vermejo River, each user is entitled to two acre feet of water for one acre to be irrigated, with the exception of the Vermejo Conservancy District which is entitled to only 1.5 acre feet of water per acre irrigated (Colo. Ex. 25). The public records of the monthly flows at the Dawson gauge, just above the Phelps-Dodge diversion point, show volumes so far in

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[5]The loss is due to seepage and evaporation in the diversion structures from the River to the reservoirs, in the reservoirs themselves and in the canals from the reservoirs to the fields.

excess of the amounts to which Phelps-Dodge would be entitled that there can be no question about water availability (Colo. Ex. 5, Tbl. 2). These figures nullify any claim that there has not been a dependable supply during the critical irrigation months.

Phelps-Dodge also leased 400 acre feet per year of its water to Kaiser (Tr. 1722; Colo. Ex. 51). This is irrefutable evidence that Phelps-Dodge had more than enough water to irrigate its acreage. Its posture of leasing away 400 acre feet of its water and then contending that it didn't have the 300 acre feet for its 150 acres is duplicitous.

Several New Mexico witnesses indicated that one reason Phelps-Dodge wasn't irrigating any more acreage was because of the failure of Phelps-Dodge to maintain its irrigation system (Tr. 2145, 2164, 2175). Thus, Phelps-Dodge appears to be seeking to hold the major portion of its paper right for some future use.

The Amici Brief at page 4 says that Phelps-Dodge has called upon the Vermejo Park Corporation to reduce its upstream diversions, but cites no transcript reference. There is no evidence that the Phelps-Dodge Corporation ever had less water than it was entitled to at its diversion point under its first priority. New Mexico's own Exhibit A-130, a U.S.G.S. experimental one-month seepage run, shows Phelps-Dodge taking approximately all the water to which it would be entitled on a yearly basis, i.e., 300 acre feet, during a one-month period from the middle of September to the middle of October, 1980. Mr. Davis, the manager of the Phelps-Dodge lessee, testified that there is no measurement of the water they take (Tr. 2168). Mr. Spencer, the general manager of the Vermejo Conservancy District, stated that actually Phelps-Dodge was irrigating no more than 80 acres (Knox Dep., p. 54).

That part of the Phelps-Dodge priority which has not been used for many years is subject to being declared forfeited or abandoned. New Mexico has a statute which provides for forfeiture if a water right has not been used for four years. 72-5-78, N.M.S.A. 1978. The testimony of the New Mexico officials is that they have undertaken no administration of water on the Vermejo River nor have they even undertaken to declare forfeitures or abandonments (Tr. 1088, 2422, 2423). New Mexico, at page 27 of its Brief before this Court, admits that Phelps-Dodge leased 400 acre feet of its water rights to Kaiser Steel Corporation "to avoid any possibility that the rights would be forfeited under New Mexico law." Colorado, and apparently the Special Master, do not believe that it is equitable to require Colorado to pass water when that water would likely not be applied to a beneficial use. New Mexico's Supreme Court likewise has stated that an upstream junior appropriator need not pass water to a downstream senior and may use water out of priority when the downstream senior appropriator is not beneficially using that water. *Worley v. United States Borax and Chemical Corp.*, 78 N.M. 112, 428 P.2d 651, 654 (1967).

Thus, the Phelps-Dodge claim that there was not enough water in the river to fulfill its first priority is completely untenable (Tr. 1078, 1079, 1085). Its present use is designed to obscure the fact that all or the major part of its water right has been abandoned. Any claim by Phelps-Dodge for all the water decreed under the 1941 decree would be a claim for future use. This is contrasted with the specific needs and uses presented by Colorado which established the "countervailing equities" recognized by the Special Master (Report, p. 23).

B. Kaiser Steel Corporation

The Kaiser use is a new use (Tr. 1105, 2437) coupled with an unlikely future use. The evidence shows that although Kaiser claims 230 acre feet of water by

purchase and 400 acre feet of water by lease from Phelps-Dodge, for a total of 630 acre feet, its maximum use was 361 acre feet in 1976, with the amount of use since that date decreasing (Tr. 1725). The priorities of the Kaiser rights are either the first priority under the lease from Phelps-Dodge or priorities senior to the Vermejo Conservancy District under its purchased rights. The Amici Brief claims that Kaiser has made demands upon the Vermejo Park Corporation to cease or reduce its diversions from the River, but cites no evidence in support. The facts are that Kaiser has had all of the water that it required for its use and is uncertain if all of those rights will be used in the future (Tr. 1727). Finally, Mr. Mutz, the New Mexico witness, testified that Colorado diversions would not significantly affect Kaiser (Tr. 1323, 1379).

C. The Vermejo Park Corporation

Mr. Reynolds, the new Mexico State Engineer, testified that Vermejo Park Corporation could have irrigated more than it has in recent years (Tr. 2427). The use of the water by this corporation is ancillary to the recreational hunting and fishing activities which are its primary purpose (Tr. 2064-67, 2108, 2109). However, it claims to have irrigated much more acreage in the 1960's than in the 1970's with the reduction due to what New Mexico has called a "severe drought." Colorado demonstrated in its Reply Brief that New Mexico's own exhibit (F-37) shows that the Vermejo Conservancy District irrigated nearly as much acreage in the 1970's as it did in the 1960's, thereby refuting any contention that the Vermejo Park Corporation could not have irrigated more than 250 acres. During the 1970's, the Vermejo Conservancy District was able to irrigate over 4,000 acres on a yearly basis (N.M. Ex. F-37). It is therefore incredible that Vermejo Park would claim that it, with a priority senior to the District, could not irrigate more than 250 acres. With an average of at least 8,400 acre feet of water passing the Colorado line annually in

the Vermejo River system, and Vermejo Park being the first appropriator below the Colorado state line, it is absurd to argue that Vermejo Park experienced a water shortage for its irrigation rights.

Again, with respect to this water right, a situation exists which would justify a declaration of forfeiture. That portion of the water right which has not been used for over four years could be subject to the New Mexico forfeiture statute, a statute which is not apparently enforced on the Vermejo River (Tr. 1088, 2425). 72-5-28, N.M.S.A. 1978. Any claim by Vermejo Park Corporation for any water over and above that necessary to irrigate 250 acres would be for future use under an abandoned water right.

The Special Master concluded that even after the Colorado diversion, Phelps-Dodge, Kaiser and the Vermejo Park Corporation would have enough water to meet their needs. He stated:

> The Master is of the opinion that the evidence presented demonstrates that sufficient water is available for Vermejo Park Corporation, Kaiser Steel and Phelps-Dodge. The flows at the Dawson Gauge indicate sufficient water to meet the needs of all three corporations regardless of which State's figures are used.

Report, p. 23.

3. Also completely ignored by Amici and by New Mexico are the water detention dams, fishponds and stockponds mentioned time and again in Bureau of Reclamation documents as the primary cause of the water shortage of the Vermejo Conservancy District (Colo. Exs. 37, 38, 40, 43, 44, 45, 48). These are among the developments since 1941 and among the current conditions which Amici would like to ignore by their reliance solely on the 1941 decree, but which have a

major bearing on the equities in this case. These dams and ponds are not regulated in the priority system, can deplete the River without restriction (72-9-3, N.M.S.A. 1978) and can be constructed at any time. Their existence belies claims that New Mexico's "water shortage" is due to drought. These ponds are not regulated by New Mexico in the priority system.

4. Amici would like to ignore completely the present irrigation practices and conditions of the Vermejo Conservancy District, a situation which was foreseen by President Truman when he signed the legislation for the Bureau of Reclamation project and referred to it as a "rescue operation" (Tr. 1560). Amici would have the project judged on the basis of the studies and reports that were made prior to its inception (N.M. Ex. C-2) ignoring the fact that the previous entity, the Maxwell Irrigation Company, had gone bankrupt (Colo. Ex. 34) and ignoring the fact testified to by Bureau witnesses that if the project were being considered today it would not be built. Mr. Weimer, the Bureau of Reclamation witness, stated as follows: "Based on current understanding of hydrology and based on current policy within the Department of Interior, I would make the statement even stronger than that. That if the project was being studied today, that it would not have been built." (Tr. 1586). The statement to which Mr. Weimer referred is one appearing in a letter dated September 26, 1978, of the Acting Assistant Secretary of the Department of the Interior wherein he said that "this project probably should not have been authorized" and that it was "evidence of the need for a more sound approach to evaluating and authorizing projects." (Colo. Ex. 46). The Vermejo Conservancy District board of directors wrote to Mr. Weimer, Regional Director of the Bureau of Reclamation, under date of January 9, 1979, saying, "Our second request was simply to have the debt written off. Since it is obvious that it can never be repaid or the project funded to make it possible." (Colo. Ex. 47). Thus, while the District should receive its fair share of

Vermejo River water, neither it nor the other Amici should be allowed to inflate their needs or disguise their uses to depict a situation which does not exist. Again, it is a matter of fairness.

5. In the first paragraph of their Brief, the Amici dramatically refer to the Vermejo as a "puny river" but say that it is "the lifeblood of Colfax County, New Mexico." If indeed this river is so vital, the neglect with which it is treated by the New Mexico water officials and the water users in New Mexico is inexcusable. This neglect is completely ignored by the Amici in their Brief, although it was the subject of significant evidence before the Special Master.

The New Mexico water officials make no effort to attempt to determine whether or not the proper amount of water is being diverted by particular water claimants (Tr. 987, 1071, 1098-1101, 1863, 1864, 1881, 1967-69, 2434). They make no effort to declare forfeitures of all or parts of water rights although such would be in accord with proper administration of water in the priority system, and would be very much in the interests of certain water users themselves (Tr. 1088, 2422, 2423).

As indicated above, the proliferating water detention dams, fishponds and stockwater ponds have become a major factor affecting the District's water supply (Colo. Exs. 37, 38, 40, 43, 44, 45, 48). There is no evidence in the record that any of the Vermejo River water users or officials, in an attempt to protect their "lifeblood," have sought to do anything about this situation and the Amici Brief completely ignores it.

It is acknowledged on all sides that only about one-third of the water diverted from the Vermejo River by the Vermejo Conservancy District reaches its farms (Colo. Exs. 69 and 70; Tr. 1280, 1286, 1315). In other words, two-thirds of the "lifeblood" is lost through seepage or evaporation. As indicated by the Bureau

documents, the canals and diversion structures are allowed to become "clogged with debris" and the long supply canals in medium grade have a "high seepage loss and heavy silting" (Colo. Exs. 37, 44). The District, like all users along the Vermejo, must do its share to conserve the common supply. *Wyoming v. Colorado*, 259 U.S. 419, 484 (1922).

The fact that the Amici do not deal with these factors which so affect the actual water availability in New Mexico would indicate that they would like to have conditions remain as they are without regard to the benefits that could be achieved through proper water management and conservation measures.

Certainly these are among the factors which were considered by the Special Master in his evaluation of the equities of the case. They support his conclusion that it would not be equitable to deny Colorado a portion of the water it produces for the Vermejo River simply to permit continued uncontrolled, unadministered and wasteful use in New Mexico.

6. In their plea that the Vermejo is a ". . . New Mexico river" (Amici Brief, p. 25), the Amici would ignore the fact that practically every river which originates in Colorado has a shorter distance in Colorado than in the other state or states into which it flows. For example, the North Platte River which was involved in *Wyoming v. Colorado* and in *Nebraska v. Wyoming* has a much shorter distance in Colorado than in the other states. So, also, do the Republican River, the South Platte River, the Arkansas River, the Colorado River, the Yampa River, etc.

No interstate compact and no decision of this or any court has suggested that the distance of flow in a particular state should control the amount of water that is allocated to the state.

CONCLUSION

It is one thing to make a case on the basis of an analysis of the evidence presented, arguing that it leads to a particular conclusion. It is quite a different thing to make a case by ignoring basic evidence and criticizing the trier of fact, who did consider that evidence.[6] Colorado believes the record speaks for itself, and belies Amici's criticism of the Special Master and the Report.

The record in this case is complete. The testimony of all witnesses that either side wanted to present was taken in an atmosphere of deliberation without pressures of time or otherwise. The documents were submitted after discovery procedures and any relevant exhibit or testimony either side wished to offer was accepted. A review of the record will show the thoroughness with which the Special Master conducted the trial and the wisdom of his analysis of the facts and the law. The record fully supports the Special Master's Report in light of the equitable apportionment principles established by this Court and his ruling should be upheld.

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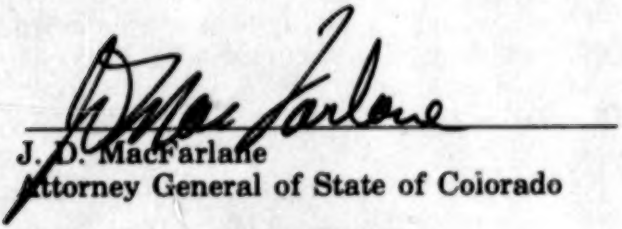
[6]E.g., Amici Brief: the Special Master "totally misconceived," page 8; "the Special Master astonishingly and with great illogic," page 11; the Special Master's "lack of comprehension," page 12; "the Special Master started out on the wrong foot," page 16; "the Special Master misperceived," page 16; "the Special Master compounded the error," page 17; "the Special Master has completely ignored," page 17.

Respectfully submitted,

STATE OF COLORADO



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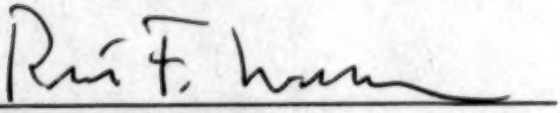

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CERTIFICATE OF SERVICE

I, Robert F. Welborn, hereby certify that I am a member of the bar of this Court and counsel of record for the plaintiff and that on June 23, 1982, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be mailed the requisite number of copies of the foregoing The State of Colorado's Reply to Brief of Amici Curiae, by first class mail, postage prepaid, to the following officials of the State of New Mexico:

The Honorable Bruce King
Governor of the State of New Mexico
State Capitol
Santa Fe, New Mexico 87503

The Honorable Jeff Bingaman
Attorney General of the State of New Mexico
Department of Justice
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Santa Fe, New Mexico 87503

I certify that on June 23, 1982, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be served by Federal Express the requisite number of copies of the foregoing The State of Colorado's Reply to Brief of Amici Curiae on the following counsel of record:

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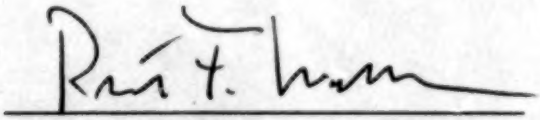
I certify that all parties required to be served have been served.



Robert F. Welborn
Special Assistant Attorney General

NO.	TITLE
80 Original	State of Colorado, Plaintiff, v. State of New Mexico and ~~Toney Anaya~~ Jeff Bingaman, Attorney General of New Mexico.

DOCKETED	COURT
July 21, 1978	Motion for leave to file bill of complaint.

DATE	PROCEEDINGS AND ORDERS
	Counsel for Plaintiff: David W. Robbins,
	Counsel for Defendent:
July 21, 1978	Motion for leave to file bill of complaint filed.
Aug. 26, 1978	Order extending time to file response until 10/18/78.
Sept. 28, 1978	DISTRIBUTED. 10-13. (Motion for leave to file bill of complaint. Response Requested.
Oct. 13, 1978	Brief in opposition filed, Attorney General of New Mexico. (Response thereto)
Oct. 19, 1978	DISTRIBUTED. 11-3. (Motion for leave to file bill of complaint.) Response Requested from the State of Colorado.
Nov. 2, 1978	Reply from the State of Colorado filed.
Nov. 8, 1978	DISTRIBUTED. 11-22.
Nov. 27, 1978	The motion for leave to file a bill of complaint is GRANTED and the defendants are allowed sixty days in which to answer.
Jan. 24, 1979	Answer to bill of complaint and motion to refer to Special Master filed.
Jan. 25, 1979	DISTRIBUTED. 2-16. (Answer to bill of complaint and motion to refer to Special Master.)
March 12, 1979	REDISTRIBUTED. 3-16. (Answer to bill of complaint and motion to refer to Special Master.)
March 20, 1979	REDISTRIBUTED. 3-23. (Answer to bill of complaint and motion to refer to Special Master.)
March 30, 1979	REDISTRIBUTED. 3-30. (Answer to bill of complaint and motion to refer to Special Master).
Apr. 11, 1979	REDISTRIBUTED. 4-13. (Answer to bill of complaint and motion to refer to Special Master).
Apr. 16, 1979	It is ordered that the Honorable Ewing T. Kerr, Senior Judge for the United States District Court for the District of Wyoming, is appointed Special Master. Powell, J., OUT.
Apr. 26, 1979	Oath of Special Master filed.
Oct. 20, 1980	Amended Answer filed. (Over)

Title

No.

DATE	PROCEEDINGS AND ORDERS
Nov. 5, 1980	DISTRIBUTED. 11-26. (Amended answer)
Dec. 1, 1980	The amended answer to the Bill of Complaint is referred to the Special Master.
Jan. 9, 1982	Report of Special Master of th Equitable Apportionment of the Vermejo River filed.
Jan. 13, 1982	DISTRIBUTED. 2-19. (Above report of special master).
Feb. 22, 1982	The Report of the Special Master on the Equitable Apportionment of the Vermejo River is received and ordered filed. Exceptions, if any, with supporting briefs to the Report may be filed by the parites within 45 days. Reply briefs, if any, to such Exceptions may be filed within 30 days.
Mar. 26, 1982	Waiver of right to file exceptions to the Report of the Special Master by Plaintiff filed.
April 6, 1982	← Motion of Kaiser Steel Corporation, et al. for leave to file a brief as amici curiae filed.
Apr. 8, 1982	Exceptions to the Report of the Special Master filed.
Apr. 22, 1982	← Motion of New Mexico, et al. for additional time for oral argument filed.
Apr. 22, 1982	Opposition of Colorado to Motion of Kaiser Steel Corporation et al. for leave to file a brief as amici curiae filed.
May 10, 1982	Reply brief filed by the State of Colorado to Exceptions to the Report of the Special Master.
May 12, 1982	DISTRIBUTED. 5-27. (Exceptions of New Mexico, Waiver of Colorado and Motion of Kaiser Steel Corporation, et al. for leave to file a brief as amici curiae).
June 1, 1982	The motion of Kaiser Steel Corporation, et al. for leave to file a brief, as amicus curiae is GRANTED. The Exceptions of New Mexico to the Report of the Special Master are set for oral argument in due course.
June 7, 1982	The motion of New Mexico, et al. for additional time for oral argument is DENIED.
June 7, 1982	Motion of New Mexico to file reply brief filed.
June 7, 1982	DISTRIBUTED. 6-10. (Above motion).
June 14, 1982	The motion of New Mexico for leave to file a reply brief is GRANTED.
June 24, 1982	Reply brief of Colorado to Motion of Kaiser Steel Corporation, et al. for leave to file amici curiae brief.
June 24, 1982	Objection by Colorado to motion of New Mexico to file reply brief filed.
Aug. 5, 1982	CIRCULATED.
Oct. 4, 1982	ARGUED.